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Supreme Court of the United States

OCTOBER TERM, 1998

RONALD GRABOSKI, RICHARD BELLANZA, EDWARD HANDIBODE, RICHARD GLEASON, GEORGE GIOVINAZZO, STEPHEN GIBBONS, and all those plaintiffs' whose names are set forth in schedule "A," which is annexed hereto, incorporated herein and made a part hereof,

Petitioners,

—against—

RUDOLPH GIULIANI, Mayor of the City of New York and as a member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, ALAN HEVESI, as Comptroller of the City of New York and as a Member of the Board of Trustees of the Firemen's Variable Supplements Fund and Fire Officers Variable Supplements Fund, THE CITY OF NEW YORK, THE BOARD OF

(caption continued on inside front cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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TRUSTEES OF THE FIREMEN'S VARIABLE SUPPLEMENTS FUND, THE BOARD OF TRUSTEES OF THE FIRE OFFICERS' VARIABLE SUPPLEMENTS FUND, "JOHN DOE" and "JOHN ROE," individually and as members of Board of Trustees of the Uniformed Firefighter's Association and members of the Firemen's Variable Supplements Fund, and as members of the Board of Trustees of the Uniformed Fire Officer's Association, and members of the Fire Officer's Variable Supplements Fund, THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, THE FIREMEN'S VARIABLE SUPPLEMENTS FUND, THE FIRE OFFICERS VARIABLE SUPPLEMENTS FUND, THE NEW YORK CITY FIRE DEPARTMENT, HOWARD SAFIR, as Commissioner of the New York City Fire Department, GEORGE PATAKI, Governor of the State of New York and the STATE OF NEW YORK,

Respondents.

QUESTIONS PRESENTED

1. Whether a member of a collective bargaining unit has a constitutionally protected contract interest in "pension benefits" created pursuant to a Collective Bargaining Agreement where subsequent enabling legislation totally eviscerates those rights in implementation by changing the very nature of the "bargained for" benefit?

2. Whether an employer scheme of deferred compensation which has the effect of categorically denying disabled retirees meaningful access to retirement benefits while categorically granting such access to similarly-situated non-disabled retirees violates the ADA under the disparate impact standard of *Alexander v. Choate*?

PARTIES

The parties are set forth in the caption herein. There are no corporate affiliations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, reported at No. 96-9257 (2d Cir. 1998), is set forth in the appendix at p. 1a.

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals, Second Circuit, sought to be reversed was entered on February 24, 1998.

On April 23, 1998 a petition for rehearing with a suggestion for rehearing *en banc* was denied by the Court of Appeals.

Jurisdiction to review the decision of the United States Court of Appeals, Second Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the evisceration of "pension benefits" provided in a collective bargaining agreement by enabling legislation and its effect upon the Contract Clause of the United States Constitution, which provides:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .

U.S. Const., Art. 1, § 10, cl. 1.

In addition, this case involves the denial of a valuable source of "non-pension" compensation known as VSF benefits to individuals with a disability and its effect upon Titles One and Two of the Americans with Disabilities Act, which prohibits discrimination against qualified individuals with a disability.

VSF benefits were created as "improvements in pension benefits" by Collective Bargaining Agreements and were

subsequently enacted into law by enabling legislation, the authority of which is found at N.Y.C. Administrative Code § 13-268 *et seq*. Contrary to the express intentions of the Collective Bargaining Agreement, the enabling legislation, Chapter 877 of the Laws of 1970, specifically declared that VSF benefits were not pension benefits:

> [V]ariable supplements fund shall not be, and shall not be construed to constitute, a pension or retirement system or fund, and that it shall function as a means whereby payments, not constituting a pension or retirement allowance, may be made . . .

Administrative Code of the City of New York §§ 13-383(b), 13-393(b).

Thereafter, in Chapters 1011 and 1012 of the Laws of 1972, the Legislature again altered the VSF benefit by restricting eligibility through a purported correction of a "typographical error," and stripping disabled petitioners of the VSF benefits conferred upon them in the Collective bargaining Agreement.

> Any person who (a) receives a retirement allowance by reason of having retired [from][1] *for* service as a member of pension fund one or pension fund one-B and as a fireman or as a wiper (uniformed), or (b) receives a benefit by reason of election of an option by such a retired fireman or such a retired wiper (uniformed).

Chapter 1011, § B19-40.00; *see* Chapter 1012, § B-19-60.0.

Chapter 583 of the Laws of 1989 again amended the Administrative Code and narrowed the class of intended beneficiaries of the variable supplement fund by another change in the definition of pension fund beneficiary to require that an eligible retiree must not only retire "for service," but that said retirement must occur after October 1, 1968 and that the eligible retiree must have twenty years of service to be eligible to receive VSF benefits.

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[1] Material in brackets was deleted in supplemental legislation.

Finally, pursuant to the insistence of the UFA, § 13-101 *et seq.* of the Administrative Code was again amended by Chapter 690 of the Laws of 1990 (A. 438), to extend eligibility for VSF benefits to firemen who retired after July 1, 1969 but prior to July 19, 1989, notwithstanding the fact that said retiree retired with less than twenty years of service.

Under New York Retirement and Social Security Law §§ 113(a), 171 and 470 and Article V, Section 7 of the New York State Constitution, petitioners submit that the enactment of legislation defining the VSF benefit as a non-pension benefit and restricting eligibility to receive said VSF benefit, unjustifiably abrogated petitioners' contractual right to "improvement in **pension** benefits" in violation of the Contract Clause of the United States Constitution (A. 322-323). In addition, petitioners also contend that restricting the VSF benefit to "for service" retirees and, thus, excluding disabled petitioners from this "non-pension benefit" violates Titles One and Two of the Americans with Disabilities Act.

STATEMENT OF THE CASE

Petitioners are retired New York City Firemen, Fire Officers, Wipers, Marine Engineers, Pilots, or Fire Marshalls (collectively, "Firefighters"). In that capacity, petitioners—having served for the minimum number of years required for retirement, or having become disabled during the course of such employment or otherwise having become disabled—currently receive a retirement allowance or pension pursuant to the provisions of the New York State Retirement and Social Security Law and/or the Administrative Code of the City of New York and/or Chapter 33 of the Rules and Regulations of the New York Fire Department Pension Fund (A. 304-305).

On or about October 1, 1968, defendants, The City of New York ("City") and the Uniformed Firefighter's Association ("UFA") entered into a Collective Bargaining Agreement ("1968 UFA Agreement") which delineated the rights,

benefits, privileges and obligations of employment as a Fireman with the City for the period October 1, 1968 to December 31, 1970 (A. 305, 318). A similar Collective Bargaining Agreement was entered into by defendants Uniformed Fire Officer's Association ("UFOA") and the City on or about June 2, 1970 ("1970 UFOA Agreement") on behalf of Fire Officers for the period October 1, 1968 to December 31, 1970 (A. 305).

As part of the 1968 UFA Agreement and 1970 UFOA Agreement, the City and the UFA and UFOA agreed to sponsor a bill in the State Legislature to provide for "improvements in *pension* benefits" for firemen (A. 323, 349-352).

The 1968 UFA Agreement and the 1970 UFOA Agreement provided for the benefit principally at issue here—a VSF benefit payable from the proceeds of the Fire Department Pension Fund. The purpose of the VSF was to provide additional financial benefits to all retirees and "to provide a supplemental benefit on a variable annuity basis for Article I and IB firemen, as determined by the trustees" (A. 306, 323).[2]

Thereafter, the Legislature enacted Chapter 877 of the Laws of 1970, which amended N.Y.C. Administrative Code § 13-268 *et seq.* to establish the Firemen Variable Supplements Fund and Fire Officers Variable Supplements Fund (A. 307-308). Although this benefit was intended to be an "improvement[ ] in pension benefits" for *all* Firemen and Fire Officers who retired as members of Pension Fund I or IB, like petitioners here, the Legislature specifically delineated the VSF benefit as a "non-pension benefit," thus removing valuable protections afforded to petitioners under the Collective Bargaining Agreements (A. 308).

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[2] The agreement made clear that all Article I and IB firefighters were covered; all that was left for determination by the trustees was the formula for determining the proceeds of the variable supplement fund (A. 382, 401-403, 678-681, 696).

Notwithstanding that all Firemen and Fire Officers who were members of Pension Fund Article I and I-B, including disabled retirees, are members of the Fire Department Pension Fund and were entitled to receive VSF benefits under the 1968 UFA Agreement, the 1970 UFOA Agreement, and pursuant to Chapter 877 of the laws of 1970, the Legislature subsequently restricted eligibility by a purported correction of a "typographical error," stripping disabled firefighters of the VSF benefits conferred upon them by earlier contracts and legislation. Thus, pursuant to Chapter 1011 and 1012 of the Laws of 1972, the definition of an eligible "Pension Fund Beneficiary" was changed to include

> Any person who (a) receives a retirement allowance by reason of having retired [from][3] *for* service as a member of pension fund one or pension fund one-B and as a fireman or as a wiper (uniformed), or (b) receives a benefit by reason of election of an option by such a retired fireman or such a retired wiper (uniformed).

Chapter 1011, § B19-40.00, *see* Chapter 1012, § B-19-60.0.

These amendments eliminated disabled retirees from the definition of "pension fund beneficiary" and, thus, from the ability to receive VSF benefits previously afforded them under the 1968 UFA Agreement, the 1970 UFOA Agreement and the 1971 UFA Agreement (as well as the rights established by Chapter 877 of the Laws of 1970).

Pursuant to Chapter 583 of the Laws of 1989 the Administrative Code was again amended to further narrow the class of intended beneficiaries of the variable supplement fund by restricting the definition of pension fund beneficiary to require that an eligible retiree must not only retire "for service," but that said retirement must occur after October 1, 1968 and that the eligible retiree must have twenty years of service to be eligible to receive VSF benefits.

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[3] Material in brackets was deleted in supplemental legislation.

By excluding those who retired prior to 1968, and the service retirees who retired with less than twenty years of service, from the right to receive VSF benefits the Legislature impaired the rights of those petitioners retiring prior to 1968 and/or with less than twenty years of service to collect variable supplement funds as established in the 1968 UFA Agreement, the 1970 UFOA Agreement, the 1971 UFA Agreement and Chapter 877 of the Laws of 1970.

Thereafter, pursuant to the insistence of the UFA, § 13-101 *et seq.* of the Administrative Code was again amended by Chapter 690 of the Laws of 1990 (A. 438), to extend eligibility for VSF benefits to firemen who retired after July 1, 1969 but prior to July 19, 1989, notwithstanding the fact that said retiree retired with less than twenty years of service. As set forth in the bill jacket (R. 440-445), retired firefighters with less than twenty years of service were eligible for variable supplement payments provided said retirees retired between 1969 and 1989, even though it was the position of the City that said retirees were not eligible to receive variable supplement funds.

Under 28 U.S.C. §§ 1291, 1295(a), the Second Circuit Court of Appeals had jurisdiction to entertain appellants' appeal. The Judgment of the Southern District of New York sought to be appealed was a Judgment which:

(a) finally determined this action on the merits since it is an appeal from a "final decision" of the district court.

(b) is appealable as of right since it is an appeal from a "final decision" of the district court.

POINT I

MEMBERS OF COLLECTIVE BARGAINING UNIT HAVE A CONTRACT INTEREST IN BENEFITS PROVIDED IN A VOTER APPROVED COLLECTIVE BARGAINING AGREEMENT

A state law violates the Contract Clause[4] if it substantially impairs a contractual relationship and is not justified by a "significant and legitimate public purpose" such as the "remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697-704 (1983).

Thus, the threshold inquiry in this Petition for a Writ of Certiorari is whether and to what extent Chs. 1011 and 1012 of the Laws of 1972 and Ch. 583 of the Laws of 1989 as set forth in Administrative Code § 13-268 *et seq.*, impaired the rights, benefits and privileges afforded to petitioners under the 1968 UFA and the 1970 UFOA Collective Bargaining Agreements.

A. The Challenged Law substantially impairs petitioners' 1968 and 1970 Contractual Rights and Expectations

The clear and unequivocal language of petitioners' Collective Bargaining Agreements demonstrate that VSF benefits were created as an "improvement[ ] in pension benefits." Article VII of the 1968 UFA Agreement[5] expressly states that the Collective Bargaining Agreements provide petitioners with "certain improvements in **pension** benefits," including the VSF benefit (Emphasis supplied) (A. 323, 704).

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[4] U.S.Const., Art. 1, § 10, cl.1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

[5] The 1970 UFOA Agreement similarly provided for "*pension* improvements" under Article X.

> *Section 1*—The City and the Union agree to sponsor mutually agreed upon legislation in the State Legislature to provide certain improvements in pension benefits as listed below.

Notwithstanding petitioners expectation that VSF benefits were "pension" benefits in the Collective Bargaining Agreements, the Legislature ignored the terms of the Collective Bargaining Agreement and Bill Jackets and created VSF benefits as 'non-pension' benefits (A. 401-416). Specifically, Administrative Code of the City of New York §§ 13-383(b), 13-393(b) stated:

> [V]ariable supplements fund shall not be, and shall not be construed to constitute, a pension or retirement system or fund, and that it shall function as a means whereby payments, not constituting a pension or retirement allowance, may be made . . .

This Court, therefore, is presented with the issue of whether and to what extent the Legislature impaired the rights, benefits and privileges afforded to petitioners under the 1968 UFA and the 1970 UFOA Agreements through enabling legislation which enacted the VSF benefit as a "non-pension" benefit.

Petitioners contend in this Petition that because VSF benefits were created as an "improvement[ ] in **pension** benefits" in the Collective Bargaining Agreement, under existing Retirement and Social Security Law §§ 113(a), 171 and 470 and Article V, § 7 of the New York State Constitution, all retirees were absolutely entitled to these VSF benefits immediately upon retirement. Therefore, it was unconstitutional for the Legislature to thereafter exclude any retiree from the receipt of VSF benefits.

In fact, under Article V, § 7 of the State Constitution and § 470 of the Retirement and Social Security Law, once petitioners' Collective Bargaining Agreements declared the VSF

benefit to be a pension benefit, the Legislature was prohibited by State Constitution and by statute from "diminish[ing] or impair[ing]" petitioners contractual right to "pension benefits" and was likewise prohibited from making **any** "changes" "with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees . . ."

For example, Article V, § 7 expressly states:

> After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, **the benefits of which shall not be diminished or impaired** (emphasis added).

Retirement and Social Security Law § 470 similarly provides:

> Until July first, nineteen hundred ninety-seven, changes negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries, **shall be prohibited** (emphasis added).

Thus, under State law it is clear that **any** changes to the pension provisions of petitioners' Collective Bargaining Agreement were prohibited by Constitution and statute, and, therefore, the Second Circuit's holding in *Castellano* v. *Board of Trustees,* 937 F.2d 752 (2d Cir. 1991), that the Legislature was free to restrict eligibility for VSF benefits because the Collective Bargaining Agreement was silent "as to which members will receive VSF payments," *Castellano, supra,* is inapplicable to the case at bar.

Indeed, unlike the facts at issue in *Castellano, supra,* here, the creation of the VSF benefit as an "improvement in

pension benefits" in the petitioners' Collective Bargaining Agreements was sufficient to establish that "**all** pensioners" were "contractually entitled to such payments," under applicable constitutional and statutory provisions in the State of New York.

In fact, under §§ 113(a) and 171 of the Retirement and Social Security Law, once the Collective Bargaining Agreements declared VSF benefits as "improvements in pension benefits," VSF benefits had to be distributed equally to all retirees under already existing pension law.

In other words, once VSF benefits were created as "pension" benefits in the Collective Bargaining Agreement, under existing State Constitution and statute, the only restrictions or exclusions that could be used to determine eligibility for VSF benefits were **existing** pension laws. The Legislature was not free to change the nature of the benefit to a "non-pension" benefit or to otherwise "set restrictions on the payment of VSF benefits." *Board of Education for School District of Buffalo* v. *Buffalo Teachers Federation*, 1996 WL 728707, *4 (Ct. App. 1996) (the law will not permit the legislature, under the guise of enabling legislation, to rewrite a contract to alter the obvious intent of the parties).

Similarly, had VSF benefits been created as an increase in existing "pension" benefits, current state law mandates that all pensioners receive the benefit because, to hold otherwise, would require the creation of a new pension system or a supplemental system and Retirement and Social Security Law § 113(a) prohibits the creation of new pension systems while Retirement and Social Security Law § 171 prohibits the creation of supplemental pension systems funded with monies from existing pension systems.

Therefore, since VSF benefits were contractually created as "pension" benefits, under Retirement and Social Security Law §§ 113(a) and 171, VSF benefits constituted an increase in already existing pension benefits and, under existing pension

laws, all retirees were absolutely entitled to said benefits if not for the Legislature's declaration that the benefit was a "non-pension" benefit. Article V, § 7; Retirement and Social Security Law §§ 113(a), 171 and 470.

Once it is determined that an expectation of benefits exists, the relevant inquiry is whether the impairment is *de minimis* or substantial. *Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2723 (1978) ("[m]inimal alteration of contractual obligations may end the inquiry at its first stage [while] [s]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation").[6] A state law that prevents a contracting party from achieving gains it reasonably expected from the contract must be subjected to careful examination. *Energy Reserves, supra*, 459 U.S. at 411, 103 S.Ct. at 704.[7]

Here, the state laws at issue not only substantially impaired petitioners' bargained for rights to VSF benefits, they eviscerated these rights entirely. Such a "sever[e] . . . impairment . . . increase[s] the level of scrutiny to which the legislation [is] subjected." *Id.* Heightened scrutiny is also required because the contracts at issue here were public contracts. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519-1520 (1977).

Indeed, the contracts which petitioners bargained for—the 1968 UFA and 1970 UFOA Collective Bargaining Agree-

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[6] Appellants need *not* demonstrate that their contractual rights were "totally destroyed." *United States Trust Co., supra*, 431 U.S. at 27, 97 S.Ct. at 1520.

[7] Careful examination is required in view of the importance that the Framers placed upon contractual expectations:

> contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel, supra, 438 U.S. at 245, 98 S.Ct. at 2723.

ments—made clear that the VSF benefit was intended to be a **pension benefit** and was intended for all firemen and fire officers. Petitioners, therefore, had an expectation of these benefits. *See Allied Structural Steel, supra*, 438 U.S. at 245, 98 S. Ct. at 2723 (parties entitled to rely on rights created by contracts); *Ass'n of Surrogates v. State of N.Y.*, 940 F.2d 767, 772 (2d Cir. 1991); A. 382, 401-416. Moreover, petitioners' contractual expectations were reasonable and worthy of constitutional protection, particularly because the State never had regulated the area of VSFs. *See Energy Reserves, supra*, 459 U.S. at 411, 103 S.Ct. 704 (as a measure of contractual expectations, one factor to be considered in determining the extent of the impairment is "whether the industry the complaining party has entered has been regulated in the past"). Plainly, by developing the VSFs, the New York State Legislature entered a field it had never before sought to regulate. *Allied Structural Steel, supra*, 438 U.S. at 249, 98 S.Ct. at 2725.

In entering into the contract that provided "improvements in pension benefits" in the form of VSF benefits for all Article I and IB members, the parties did not contemplate and State Constitution did not allow for subsequent legislation to exclude disabled retirees (Chs. 1011 and 1012 of the Laws of 1972), and service retirees with less than twenty years of service who retire after 1989 (Ch. 583 of the Laws of 1989). Thus, the subsequent legislation substantially impaired petitioners contractual rights. *See Ass'n of Surrogates, supra*, 940 F.2d at 772 (revocation of lag payroll rights upon which workers reasonably relied was a substantial infringement of contractual expectations).

B. Substantial Impairment of Petitioners' Contractual Rights is Not Justified By a Legitimate State Interest.

Since the State law accomplished a severe impairment of petitioners' contractual rights, the "height of the hurdle the state legislation must clear is elevated and a careful examination of . . . [its] nature and purpose is required." *Allied*

Structural Steel, *supra*, 438 U.S. at 245, 98 S.Ct. at 2723. Moreover, "courts are not so deferential when the State's legislation is self-serving and impairs the obligations of *its own* contracts." *Ass'n of Surrogates*, *supra*, 940 F.2d at 771 (Emphasis supplied).

In determining the significance and legitimacy of a public purpose, the inquiry is whether "the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves*, *supra*, 459 U.S. at 412, 103 S.Ct. at 705. The Supreme Court has defined "police power" for Contract Clause purposes, "as an exercise of the sovereign right of the Government to protect the lives, health, morals, comforts, and general welfare of the people. . . ." *Manigault v. Springs*, 199 U.S. 473, 480, 26 S.Ct. 127, 130 (1905). A State law impairing the State's prior contractual obligation is valid only if 'it is reasonable and necessary to serve an important public purpose.' " *United States Trust Co.*, *supra*, 431 U.S. at 25, 97 S.Ct. at 1518. *See also*, *Allied Structural Steel*, *supra*, 438 U.S. at 243-244, 247, 98 S.Ct. at 2721-22, 2723.

An analysis of the relevant interests in this case suggests that there is no police power served by the exclusion of any pensioners from the "pension" benefits reasonably expected by them pursuant to the 1968 UFA and 1970 UFOA Agreements. *See*, *e.g.*, *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990) (State cannot justify impairing its contractual obligations to public employees by pointing to advantages accrued by other employees (citation omitted)).

Accordingly, the subsequent legislation serves no broad public purpose and, as applied to the 1968 UFA and 1970 UFOA Collective Bargaining Agreements, is unconstitutional as violative of the Contract Clause.

POINT II

THE VSF SCHEME VIOLATES THE ADA UNDER *ALEXANDER V. CHOATE* BECAUSE IT DENIES MEANINGFUL ACCESS TO VSF BENEFITS TO DISABLED RETIREES WHILE GRANTING VSF BENEFITS TO SIMILARLY-SITUATED NON-DISABLED RETIREES.

This case presents the issue of whether the VSF scheme's eligibility criteria have the effect of excluding disabled retirees while including similarly-situated non-disabled retirees, thus violating the Americans with Disabilities Act ("ADA"). The proper analytical framework for addressing this claim is provided by *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712 (1985), (hereinafter "*Alexander*").

A. The Circuit Court Ignored or Misapplied the Proper Analytical Framework Set Forth in *Alexander v. Choate*.

In *Alexander* the Supreme Court announced the proper standard to analyze a claim of disparate impact under the ADA, to wit, that an otherwise qualified individual must be provided with meaningful access to the benefit provided. *Id.* at 302. The Court further specified that the benefit

> cannot be defined in a way that effectively denies otherwise qualified [disabled] individuals the meaningful access to which they are entitled.

Id.

In *Alexander* the plaintiffs, a class of Medicaid recipients, challenged the State of Tennessee's reduction of medicaid-covered hospital inpatient days from 20 to 14, claiming that this reduction violated § 504 of the Rehabilitation Act because the reduction in covered days had a disproportionate impact on the handicapped. The District Court dismissed the complaint and was reversed by the Court of Appeals, which

held that the plaintiffs had established a prima facie case of a § 504 violation.

The Supreme Court reversed, finding that since all handicapped Medicaid recipients had the same access to the disputed benefit (coverage for 14 inpatient hospital days), no claim under the Rehabilitation Act was stated.

The case at bar, like *Alexander*, presents a claim of disparate impact based upon disability: the eligibility criteria in the VSF statute have the effect of categorically excluding disabled retirees from VSF eligibility, while simultaneously including similarly-situated non-disabled retirees. Therefore, the Circuit Court had an obligation to analyze this case in terms of the *Alexander* framework.

Under *Alexander*, the proper inquiry in this case is whether the plaintiff class of disabled retired firefighters was provided with meaningful access to the benefit in question, to wit, VSFs. As to disabled retirees with fewer than twenty years of service the answer is clearly "no," for it is undisputed on the record that the VSF scheme categorically excludes all of these disabled retirees from VSF eligibility, while including nondisabled retirees with fewer than twenty years of service. The VSF scheme does just what *Alexander* prohibits: it purportedly uses "service" as the touchstone for receipt of VSF benefits, a criterion which has the effect of categorically denying VSFs to certain disabled firefighters while granting VSFs to similarly situated non-disabled firefighters. *See* Point II(B)(1), *infra* at 16-18. The "service" criterion thus defines VSF benefits "in a way that effectively denies otherwise qualified [disabled] individuals the meaningful access to which they are entitled." *See Alexander*, at 302. Because VSFs are a form of deferred compensation and not part of a pension package, use of any criterion, including "service, which excludes disabled retirees and includes non-disabled ones violates the ADA. *See* Point II(C), *infra* at 23-30. Therefore, the VSF scheme's "service" criterion denies disabled retirees "meaningful access" to VSFs in violation of the ADA as governed by *Alexander*.

The Circuit Court was bound to apply the *Alexander* framework to decide the issue presented by this case, to wit, whether a claim of disparate impact discrimination was stated under the ADA. However, while the Circuit Court paid lip-service to *Alexander* in a brief parenthetical citation, [App. at p. 28a], it failed to meaningfully apply its standard. The Circuit Court apparently analyzed the case as one alleging "disparate treatment," rather than disparate impact. Evidence of this appears in the Court's conclusion that the VSF scheme complies with the ADA because it excludes on the basis of "service"—a facially neutral basis—rather than on the unlawful discriminatory basis of disability *per se*. The Court failed to focus on the discriminatory *impact* of the ostensibly neutral "service" criterion. However, even assuming in theory that the Circuit Court's reliance on the principle of a "nondiscriminatory basis for exclusion" were proper, the Circuit Court committed factual error when it concluded that "20 years of service" is the eligibility criterion for VSFs.

B. The Circuit Court's Factual Errors Regarding the Relevant Plaintiff and Comparison Classes.

The Circuit Court's superficial nod to *Alexander* and its ultimate holding that VSFs are permissibly based on a "service" criterion were bolstered by a flawed analytical framework and basic factual errors. The centerpiece of the Circuit Court's flawed analysis was an artificial division of the plaintiffs into two classes: "Class I Retirees," comprising "Retirees with Less Than Twenty Years of Service" [App. at 26a], and "Class II Retirees," comprising "Retirees with Twenty Years of Service Who Retired Under a Disability Plan." [App. at 28a]. Based upon this dual classification of the plaintiffs the Circuit Court concluded in a two-part holding that, as to each class, the VSF scheme did not discriminate because of disability, because the plaintiffs were excluded based on years of service, rather than based on disability.

However, the Circuit Court's dual classification of the plaintiffs eliminated various of plaintiff sub-classes and thus elim-

inated key comparison factors from the disability discrimination analysis. This omission led to an incorrect holding affirming the dismissal of the plaintiffs' claim for failure to state a cause of action under the ADA. That holding, and its erroneous factual and analytical underpinnings, must now be reversed and the plaintiffs' claims under the ADA reinstated.

1. The Plaintiff and Comparison Classes That Should Have Been, But Were Not, Considered By The Circuit Court.

In order to conduct a proper disability discrimination analysis in this case six groups of retirees must be taken into account as set forth below and as further summarized in the attached table ("Table A") [App. at p. 40a-41a].

1. **Plaintiff Class**, of disabled retirees with 15 but fewer than 20 years of service who do not receive VSFs, referred to as plaintiff "Sub-Class #1b" on Table A.

2. **Plaintiff Class** of disabled retirees with fewer than fifteen years of service who do not receive VSFs, referred to as plaintiff "Sub-Class #1a" on Table A.

3. **Comparison Class** of nondisabled retirees with 15 but fewer than 20 years of service who receive VSFs, referred to as Comparison Class #1 in Table A.

4. **Plaintiff Class** of disabled retirees with 20 or more years of service who chose disability retirement before 1972, when VSFs were part of the disability retirement package but who were subsequently stripped of VSFs by legislative fiat in 1972. Referred to as Plaintiff "Sub-Class" #2 on Table A.

5. **Plaintiff Class** of disabled retirees with 20 or more years of service who chose disability retirement after 1972, when VSFs were no longer part of the disability retirement package. Referred to as Plaintiff "Sub-Class #3" on Table A.

6. **Comparison Class** of nondisabled retirees with 20 or more years of service who receive VSFs, referred to as Comparison Class #2 on Table A.

The Circuit Court's "Class I - Class II" distinction eliminated Plaintiff Sub-Class #1(b) and Comparison Sub-Class #1; and lumped together Plaintiff "Sub-Classes" #2 and #3. From these critical omissions stemmed the Circuit Court's flawed discrimination analysis and, ultimately, its incorrect affirmance of the dismissal of the plaintiffs' case. As to the Sub-Class #1(a) plaintiffs, the Circuit Court failed to apply the *Alexander* standard.

2. The Circuit Court's Errors with Regard to the "Class I" Plaintiffs.

The Circuit Court grouped all disabled retirees with fewer than twenty years of service into a single "Class I." As to this bloc of plaintiffs the Circuit Court held that no disability discrimination claim was stated under the ADA:

> [b]ecause VSF payments are available *equally to persons with and without disabilities who retire after twenty years of service.*

[App. at 27a, (emphasis added)]. In so holding, the Circuit Court apparently assumed that only retirees with twenty years of service are eligible for VSFs. This factual assumption was wrong.

In fact, there is a group of retirees with fewer than twenty years of service who do receive VSFs. These are the "vested" retirees defined in the New York City Administrative Code ("Code") § 13-361 as firefighters with fifteen but fewer than twenty years of service. (Comparison Sub-Class #1(b) - Table A). This group of non-disabled retirees was legislatively grandfathered into the VSF scheme in 1990, whereupon all became eligible to receive VSFs notwithstanding that they lacked twenty years of service. Administrative Code § 13-101 *et seq.*, as amended by Chapter 690 of the Laws of 1990

(A. 438). *See* Statement of the Case, *supra*, at 6. Thus the Circuit Court's factual assumption, central to its holding, that only retirees with twenty years of service are eligible for VSFs, was in error and contrary to the record. The Circuit Court's error is apparent on the face of the opinion below:

> [t]he Class I retirees are similarly situated not with twenty-year "for service" retirees, but with non-disabled retirees who retire after an equivalent period of service. Because *the latter group is not entitled to VSFs there is no unlawful discrimination*.

[App. at p. 26a-27a; (emphasis added).] In fact, the "latter group" includes the "vested" retirees who are indeed eligible for VSFs even though they lack twenty years of service.

The Circuit Court's failure to acknowledge this key comparison sub-class was mirrored by its failure to differentiate, among the so-called "Class I" plaintiffs, the sub-class of disabled firefighters who have fifteen but fewer than twenty years of service but are ineligible, for VSFs. (Plaintiff Sub-Class #1(b) - Table A). Instead, the Circuit Court assumed that the Class I plaintiffs only included retirees with fewer than 15 years of service:

> These Class I retirees assert in substance that the ADA entitles a *disabled person who retires after ten, or even two*, years to receive the same pension *as a twenty-year retiree*.

[App. at p. 26a (emphasis added). In fact, the "Class I" plaintiffs are not merely comprised of "disabled person[s] who retire[ ] after ten, or even two, years," but also include the sub-class of disabled retirees with fifteen but fewer than twenty years of service.

By ignoring Plaintiff Sub-Class #1(b) and Comparison Sub-Class #1, the Circuit Court failed to recognize that disabled retirees with fewer than twenty years of service have the same years of service as the non-disabled "vested" but, unlike the latter, are ineligible for VSFs. These disabled retirees with

fewer than twenty years claim discrimination vis-a-vis the non-disabled "vested" retirees who *are* eligible for VSFs even though they lack twenty years of service. Yet the Circuit Court ignored this claim and found that the "Class I" retirees were claiming a right to the same benefits as a "twenty-year retiree." [App. at p. 26a-27a].

By grouping all disabled retirees with fewer than 20 years of service into a monolithic "Class I," the Circuit Court erroneously compared the disabled "Class I" plaintiffs *en bloc* to non-disabled retirees with less than twenty years. By failing to identify the plaintiffs with fewer than twenty years of service who would have been eligible for VSFs *but for their disability*, the Circuit Court necessarily failed to consider and compare this sub-group of retirees (Plaintiff Sub-Class #1(b)) with the nondisabled "vested" retirees (Comparison Class #1). Had the Circuit Court done so, it would have reached the correct holding in this case, namely, that the VSF scheme has a discriminatory impact on disabled firefighters because, *inter alia*, all firefighters who have worked fifteen but fewer than twenty years are entitled to VSFs except those who are disabled. Thus, the distinguishing factor for VSF eligibility among the so-called "Class I" retirees is not, as the Court found, years of service, but disability.

When the exclusion of Plaintiff Sub-Class #1(b) from the VSFs is considered, the VSF scheme violates even the EEOC interpretative guidelines which the District and Circuit Courts below adopted. Specifically, the EEOC Notice states that discrimination under the ADA exists when

> "an employer requires persons covered by the ADA to serve 25 years to obtain a service benefit, while persons not covered by the ADA are eligible for service retirement after 20 years."

[A. 718, *Grabowski* v. *Giuliani*, 937 F.Supp. 258, 268 (S.D.N.Y. 1996)] The VSF scheme violates the ADA under this EEOC example because it requires disabled firefighters to

serve 20 years prior to eligibility whereas it only requires non-disabled firefighters to serve 15 years prior to eligibility.

The Circuit Court completely ignored this aspect of the discrimination analysis although it was squarely presented. [App. at p. 18a-28a; Plaintiff's Brief at p. 39, par. 1]. The plaintiffs specifically argued to the Circuit Court that their disability discrimination claims must be analyzed within the framework of the relevant plaintiff and comparison classes as summarized above. *See* Plaintiffs' Brief at 37-39; Plaintiffs' Reply Brief at p. 16. Inexplicably, the Circuit Court failed to do so and thus ignored two of the critical factors in the disability discrimination inquiry: (1) that the "Class I" plaintiffs include disabled firefighters with fifteen but less than twenty years of service who are ineligible for VSFs solely because of their disability; and (2) that the relevant comparison class is comprised of the nondisabled firefighters with the same amount of service as the disabled retirees who nevertheless are eligible for VSFs.

Accordingly, the Circuit Court's dismissal of the "Class I" plaintiffs' claim was erroneous, must be reversed and the claim reinstated.

3. The Circuit Court's Errors with Regard to the "Class II" Plaintiffs.

The Circuit Court grouped all disabled retirees with twenty or more years of service into a single "Class II." Again, as with the "Class I" plaintiffs, the Circuit Court grouped differently-situated sub-classes of plaintiffs under a single umbrella, and thereby failed to consider critical distinctions that directly impact the discrimination analysis. Specifically, the Circuit Court failed to distinguish between the retirees who elected disability retirement pre-1972—when VSFs were included in that retirement option—and the retirees who elected disability retirement post-1972—when VSFs were legislatively eliminated for disabled retirees.

As to these plaintiffs, the Circuit Court held that the VSF Scheme did not discriminate on the basis of disability because, in the Circuit Court's view, all disabled retirees with twenty or more years of service freely "chose" to become ineligible for VSFs when they elected to retire under the disability option of their pension plan. [App. at 28a]. The Circuit Court disposed of these claims *en bloc*, under the rubric of "Class II retirees," indiscriminately applying a "choice" analysis drawn from *Felde v. City of San Jose*, 839 F.Supp. 708, (N.D. Cal. 1994) *aff'd mem.*, 66 F.3d 335 (9th Cir. 1995) (unpublished disposition), 1995 WL 547698 at *2.

Initially, the propriety of the Circuit Court's reliance on the unpublished opinion in *Felde* is highly questionable, for under Ninth Circuit Rule 36-3 the opinion was to have no precedential effect and was not to be cited except under the doctrines of law of the case, res judicata, or collateral estoppel, none of which apply to the case at bar. However, even assuming *arguendo* that the Circuit Court's reliance on *Felde* were procedurally proper and that the *Felde* "choice doctrine" was relevant to this case, *but cf.* Discussion in Point II(C)(3) *infra* at 28-30, *Felde* is distinguishable and therefore inapplicable to this case.

At issue in *Felde* was a municipal firefighters' retirement scheme which awarded 100% of accumulated sick leave to service retirees, but only 80% to disability retirees. The scheme in *Felde* gave disability retirees with the requisite amount of service the option of retiring on a regular service basis. The plaintiff in *Felde* challenged the scheme as violative of the ADA because it excluded disabled retirees from the same level of benefits available to non-disabled retirees. Plaintiff was a disabled retiree who could have chosen regular retirement but elected not to. As a result, plaintiff was only eligible for 80% of his accrued sick leave. The District Court dismissed his claim, holding that the retirement scheme's choice mechanism ensured equal access to the 100% sick leave benefit, which was all that was required, according

to the *Felde* court, under *Alexander v. Choate*[8]. 1995 WL 547698 at *2.

Relying on *Felde*, the Circuit Court held that the "Class II" disabled retirees who "elected" disability retirement "freely-chose" to forego VSFs and therefore could not claim discrimination based upon disability. The Circuit Court's application of *Felde* to the retirees who elected disability retirement *prior* to the 1972 amendment, i.e., when VSFs were part of the disability retirement package, was absurd. The only voluntary choice made by these retirees was to elect disability retirement including VSFs. Plaintiff's Brief at 39, par. 2. These retirees did not "choose," as the Circuit Court's undifferentiated analysis implies, to be subsequently stripped of freely-chosen VSFs. It defies logic and common sense to posit that the retirees who were legislatively stripped of VSFs *after* electing a disability retirement package that *included* VSFs, "freely chose" to be stripped *post hoc* of their VSFs. Yet the Circuit Court's undifferentiated analysis implied as much.

Thus, even assuming *arguendo* that *Felde* was an applicable and persuasive precedent, the Circuit Court erred in treating the pre-1972 and post-1972 retirees as similarly-situated and thereby reached an incorrect holding of non-discrimination as to the "Class II" plaintiffs.

The Circuit Court's affirmance of the dismissal of the "Class II" plaintiffs' claim for failure to state a cause of action was in error, must be reversed and the claim reinstated.

C. The Circuit Court Relied Upon The Erroneous Premise that VSFs are a "Pension."

The Circuit Court characterized the VSFs as "pension" benefits in direct contravention of the Code which defines them, and rejected the plaintiffs' contention that VSFs are "deferred

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[8] The *Felde* courts, like the Circuit Court here, also appeared to have paid mere lip-service to the *Alexander* standard.

compensation." [App. at p. 28a-29a]. These findings by the Circuit Court as to the nature of VSFs were in error and led to an improper denial of the disability claims asserted by all the plaintiffs in the case.

1. The Circuit Court Ignored the Plain Language of the Implementing Statute.

The VSF Statute explains in no uncertain terms that VSFs are not to be considered "pension" benefits. The relevant portion of the VSF Statute reads as follows:

> . . . b.(2) The legislature hereby declares that the variable supplements authorized by this article and the granting and receipt thereof:
>
> (i) shall *not create or constitute membership in a pension or retirement system* and shall *not create or constitute a contract with any pensions fund beneficiary or with any member of pension fund one or pensions fund one-B*; and
>
> (ii) shall *not constitute a pension or retirement allowance or benefit under pension fund one or pension fund one-B or otherwise.*

Chapter 877 of the Laws of New York, 1970, Article 5 of the Administrative Code of the City of New York, Section B19-63.0 ("Payment of supplemental benefits"). *See also*, Administrative Code of the City of New York §§ 13-383(b), 13-393(b), quoted *supra* at 8.

The District Court below acknowledged the plain language of the statute defining VSFs as distinct from pension benefits:

> [t]he VSF statutes made it clear that the VSFs "shall not be, and shall not be construed to constitute, a pension or retirement system or fund," and payments from the VSFs do not constitute "a pension or retirement allowance." *Code* §§ 12-383(b); 13-393(b)

The VSF Statute was reproduced in full on the record below and was squarely before the Circuit Court. *See* A. 393.

The Circuit Court nevertheless characterized VSFs as "pension," in effect re-writing the statute in a vacuum and thereby reaching a wrong decision in this case. The Circuit Court's error is apparent in the portion of its opinion where it purports to characterize the claim of the so-called "Class I" plaintiffs as the right

> to receive the same *pension* as a twenty-year retiree.

[App. at p. 26a (emphasis added)]. As is evident from the face of the opinion, the Circuit Court's mischaracterization of VSFs as "pension" contravenes the plain language of the VSF Statute. In this respect the Circuit Court erred on a par with the EEOC which, in its Interpretive Notice, mistakenly classified VSFs as "additional pension benefits." [A. 704; Plaintiffs' Brief at 34].

2. The Court's Failure to Recognize the VSFs as Deferred Compensation was in Error; Denial of VSFs to Disabled Retirees Constitutes *Per Se* Violation of the ADA.

If VSFs are not pension benefits, then what are they? The Circuit Court left this critical question unanswered since, disregarding the VSF Statute, it simply assumed VSFs to be a form of "pension" benefits. The plaintiffs maintained that the VSFs are a form of deferred compensation, partly on the basis of the New York Court of Appeals decision in *Gagliardo et al. v. Dinkins et al.*, 89 N.Y.2d 62, 674 N.E.2d 298 (1996) which specifically held that VSFs were

> *additional future compensation for services actually rendered* within . . . the bargaining unit during the life of the agreement.

89 N.Y.2d at 74-75, 674 N.E.2d at 303 (emphasis added); Plaintiff's Brief at 34-36.

When VSFs are properly viewed as deferred compensation, the statutory denial of those benefits to disabled retirees is *per se* violative of the ADA because only those retirees who are disabled are deprived of payment for work actually performed. The point is illustrated by the following hypothetical analogy. Firefighter A and Firefighter B both work for twenty years. Both earn $10.00 per hour and both are entitled, upon retirement, to a deferred salary worth $3.00 per hour worked provided they work for twenty years. Both retire after twenty years and have thus fulfilled the condition rendering them eligible for the deferred salary. However, Firefighter A is disabled and Firefighter B is not. Under the current VSF scheme Firefighter B collects deferred compensation as of right but Firefighter A, because s/he is disabled, is only given the *option* to collect deferred compensation. Firefighter A, who is disabled, is forced to choose. Thus, even though both Firefighter A and Firefighter B equally earned their deferred compensation with twenty years of service, only Firefighter B—who is not disabled—gets it as of right. The blunt effect of the VSF Statute is that, unlike the non-disabled retirees, the disabled retirees do not receive the payments even though they have met the condition required for receipt of the benefits, to wit, fifteen years of service. This effect constitutes disparate impact discrimination "because of disability" under the ADA.

In short, VSFs are deferred compensation and consequently, unlike pensions benefits, they cannot be differently apportioned between disabled and non-disabled retirees without violating the ADA.

The Circuit Court summarily rejected the plaintiffs' argument on three different grounds. First, the Circuit Court found that the Court of Appeals' definition of VSFs as "additional future compensation for services actually rendered" was not dispositive of the character of VSFs because the Court of Appeals' statement arose in the context of a claim that VSFs violated the New York Constitution's gift ban. [App. at p. 29a].

Second, the Circuit Court declared without explanation that the plaintiffs' position that VSFs are deferred compensation was undermined by the Court of Appeals' statement in *Gagliardo* that VSFs are similar to "inducement[s] to remain in active . . . service." [App. at p. 29a]. The Circuit Court further opined that

> the fact that the level of VSFs does not vary by years served is a further indication that the VSF is not bargained-for compensation for services rendered.

[App. at p. 29a]. Third, the Circuit Court held that the Court of Appeals' definition of VSFs as deferred compensation was not probative in light of *Gagliardo*'s "ultimate holding" that VSFs do not violate the ADA. [App. at p. 29a] All three bases for the Circuit Court's decision are incorrect and are addressed *seriatim* below.

First, the Circuit Court's failure to defer to, or accept, the Court of Appeals' definition of VSFs as deferred compensation merely because the definition arose in the context of a different legal claim was arbitrary, as it implied that the definition of what VSFs are will vary depending on the need to challenge them. Such a chameleon-like definition flies in the face of the actual language of the VSF Statute, which specifically states that the VSFs are not "pension."

Second, the Circuit Court's conclusion that VSFs are not deferred compensation because they are inducements to remain in active service is nonsensical, particularly when applied to the disabled retirees with twenty years. For if these retirees did work twenty years—thus presumably earning their inducements—why are they not entitled to VSFs the same as the non-disabled retirees who worked twenty years? If VSFs are inducements to guarantee twenty years of service, then denying the VSFs only to disabled retirees—the exclusion accomplished by the VSF Statute—is discrimination "because of disability" under the ADA. The Circuit Court's reasoning in rejecting the argument that VSFs are deferred compensation was thus internally inconsistent.

Third, the Circuit Court's rejection of the deferred compensation position on the basis of the holding in *Gagliardo* that VSFs did not violate the ADA was improper. First, the Circuit Court is not bound by a state court's interpretation of a federal right, *see Wright v. West*, 505 U.S. 277, 300, 112 S.Ct. 2482, 2495 (1992) (White, J. concurring) (State court cannot have the last say when it may have misconceived a federal constitutional right), particularly where, as here, the state court denied the existence of a federal right under the ADA—post-employment standing—where the Federal Court affirmed its existence. Second, the argument advanced by the plaintiffs herein—since VSFs are a form of deferred compensation, discrimination occurs every time a disabled retiree is denied VSFs—was not presented to, and thus never entertained by, the Court of Appeals in *Gagliardo*. Indeed, *Gagliardo*, in effect, held as a threshold matter that the plaintiffs were not "qualified individuals with disabilities," thus reaching the opposite result from the District Court, 937 F.Supp. 258, 267, and the Circuit Court, 1998 WL 91216 (2nd Cir. (N.Y.)) at *10. None of the holdings in *Gagliardo*, therefore, are persuasive, let alone dispositive, of the claims raised in this case.

Therefore, the Circuit Court's rejection of the plaintiffs' position that VSFs are deferred compensation was based upon flawed and internally inconsistent reasoning. The Circuit Court must be reversed and the plaintiffs' claim reinstated.

3. Given that the VSFs are Deferred Compensation, The Circuit Court Improperly Relied on the "Choice" Analysis.

When VSFs are properly viewed as deferred compensation—"additional future compensation for services actually rendered," *Gagliardo*, *supra*—the imposition of any choice on the availability of the VSFs is unlawful *ab initio*.

In terms of the hypothetical Firefighters posited in section II.(C)(2), *supra* at 25, the VSF Scheme distributes VSFs as of

right only to Firefighter B, whereas Firefighter A is made to "chose", even though both Firefighters equally earned their deferred compensation with twenty years of service. The plaintiffs' central argument below was that imposition of the choice only upon the similarly-situated Firefighter A is thus *per se* discriminatory on the basis of disability. The one-sided imposition of "choice" itself violates the ADA because it puts similarly-situated disabled retires in a negative position vis-a-vis non-disabled retirees. For instance, all employees working for 15 years receive their deferred compensation *except disabled ones*. This is the essence of the discrimination analysis which the plaintiffs presented to the courts below but which both lower courts ignored. It is for this reason that the *Felde* "choice" doctrine—that the availability of a choice defeats a claim of disability discrimination—is inapplicable to this case.

Inexplicably, the Circuit Court failed entirely to address the argument, holding instead that the disabled "Class II" plaintiffs failed to state a claim under the ADA because, under *Felde*, they had a "choice" to opt in or out of VSFs. The Circuit Court's failure to address the plaintiffs' argument that very imposition of "choice" only on disabled retirees was itself the linchpin of discrimination in this case, was in error.

However, even assuming that the *Felde* "choice" doctrine was appropriate in this case, the factual distinctions in this case render *Felde* inapplicable herein. First, the plaintiff in *Felde* never raised the claim that the accrued sick leave payouts were a form of deferred compensation. It appears that in *Felde* it was simply assumed that the accrued sick leave payout was a form of "pension" benefits. Here, plaintiffs argue that VSFs are a form of deferred compensation, not "pension" benefits, and therefore cannot be linked to any disability-based choice mechanism without violating the ADA. This critical point alone distinguishes this case from *Felde*. Put another way, even assuming *arguendo* that *Felde* was properly decided, the *Felde* "choice" analysis is inapplicable here,

where the benefit at issue—VSFs—is a form of deferred compensation, i.e., already earned and vested money. This claim was never raised or addressed in *Felde*[9] and thus it was improper for the Circuit Court to treat *Felde* as controlling and dispositive of the plaintiffs' ADA claim in this case.

In short, had the Circuit Court properly treated VSFs as deferred compensation, rather than "pension" benefits, the Circuit Court would have reached the correct conclusion herein, namely, that the VSF Statute discriminates against the plaintiffs "because of disability" because it conditions receipt of already-earned moneys by disabled retirees upon a "choice," while unconditionally delivering the very same—already-earned—benefit to non-disabled retirees.

For all of the reasons stated above, the VSF scheme violates the ADA. The Circuit Court's order dismissing the plaintiffs' claim was in error, must be reversed and the plaintiffs' claim reinstated.

CONCLUSION

Petitioners submit that this petition for a writ of certiorari brings before this Court substantial questions for review, all of which require plenary consideration with briefs on the merits and oral argument for their resolution.

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[9] Indeed, although neither the *Felde* court nor the Circuit Court in this case discussed the point, it may be that the benefit at issue in *Felde* (accumulated sick leave) is not customarily treated as deferred compensation, is in the nature of a discretionary, non-vested, benefit and may therefore be distributed differently to disabled and nondisabled persons without offending the ADA. Deferred salary, on the other hand, is clearly a vested benefit which "runs with the employee" into retirement. As such it cannot be subject to discretionary distribution, whether disability-based or otherwise.

Dated: Williston Park, New York
May 19, 1998

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed April 23, 1998
Dkt. No: 96-9257

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of April one thousand nine hundred and ninety-eight.

GRABOSKI,

Plaintiffs-Appellants,

v.

GIULIANI,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Graboski.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1996

(Argued June 9, 1997 Decided February 24, 1998)

Docket Nos. 96-7920, 96-9004(CON), 96-9257, 96-9289, 96-9601, 96-9237

PETER CASTELLANO, et al.,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

RONALD GRABOSKI, et al.,

Plaintiffs-Appellants,

—against—

RUDOLPH GIULIANI, et al.,

Defendants-Appellees.

ALPHONSE ADORNETTI, et al.,

Plaintiffs-Appellants,

—against—

NEW YORK CITY EMPLOYEES
RETIREMENT SYSTEM, et al.,

Defendants-Appellees.

JOHN A. CLIFFORD, et al.,

Plaintiffs-Appellants,

—against—

NEW YORK POLICE PENSION FUND, et al.,

Defendants-Appellees.

SERAFINO F. VELARDI,

Plaintiff-Appellant,

—against—

THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND,

Defendant-Appellee.

Before:

OAKES, WALKER, and PARKER,

Circuit Judges.

Plaintiffs-appellants Peter Castellano *et al.* ("Castellano appellants") appeal from the June 28, 1996 judgment by the United States District Court for the Southern District of New

York (Sidney H. Stein, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), their complaint under Titles I and II of the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. § 12101 *et seq.*, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. § 621 *et seq.*, the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and various claims under New York law. (No. 96-7920). *See Castellano v. City of New York*, 946 F. Supp. 249 (S.D.N.Y. 1996).

Plaintiffs-appellants Ronald Graboski *et al.* ("Graboski appellants") and Serafino F. Velardi ("Velardi") appeal from the September 5, 1996 judgment by the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), the Graboski appellants' complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the ADEA, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, and various claims under New York law, (No. 96-9257), and dismissing Velardi's complaint under Title I of the ADA. (No. 96-9237). *See Graboski v. Giuliani*, 937 F. Supp. 258 (S.D.N.Y. 1996).

Plaintiffs-appellants Alphonse Adornetti *et al.* ("Adornetti appellants") appeal from the September 9, 1996 judgment by the United States District Court for the Eastern District of New York (Eugene H. Nickerson, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), their complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, the Takings Clause, and various claims under New York law. (No. 96-9289). *See Adornetti v. New York City Employees' Retirement Sys.*, No. 95-CV-3842, 1996 WL 518097 (E.D.N.Y. Aug. 28, 1996).

Plaintiffs-appellants John A. Clifford *et al.* ("Clifford appellants") appeal from the March 6, 1997 judgment by the

United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), their complaint under Title I of the ADA. (No. 96-9601). *See Clifford v. New York City Police Pension Fund*, No. 96-CV-6806 (S.D.N.Y. Mar. 6, 1997).

Plaintiff-appellant Peter Harris ("Harris") appeals from the July 17, 1996 judgment by the United States District Court for the Southern District of New York (Kevin Thomas Duffy, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), Harris's complaint under Title I of the ADA. *See Houlihan v. City of New York*, No. 95-CV-6373, 1996 WL 393576 (S.D.N.Y. July 15, 1996). Harris's appeal has been consolidated with the Castellano appeal, is included in the Castellano caption, and has the docket number 96-9004. We analyze Harris's ADA claim together with that of the other Castellano appellants.

We affirm all of the above judgments (Nos. 96-7920, 96-9257, 96-9289, 96-9601, 96-9004) except for the judgment dismissing Velardi's complaint (No. 96-9237), which we vacate and remand for further proceedings.

RONALD PODOLSKY, Hauppauge, New York, for *Plaintiffs-Appellants* in Docket Nos. 96-7920 and 96-9004(CON).

IRVING ARNOLIK, New York, New York for *Plaintiff-Appellant* Peter Harris in Docket Nos. 96-7920 and 96-9004(CON).

JAMES J. DWYER, New York, New York (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, Pamela Seider Dolgow, Anshel David, Marta B. Soja, of counsel, on the brief) for *Municipal Defendants-Appellees* in Docket Nos. 96-7920 and 96-9004(CON).

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ELLIOT I. SUSSER, Lysaght, Lysaght & Kramer, P.C., Lake Success, New York for *Defendants-Appellees* The Patrolmen's Benevolent Association of the City of New York and their Trustees on the Police Pension Fund in Docket Nos. 96-7920 and 96-9004(CON).

JENNIFER S. GOLDSTEIN, Washington, D.C., (C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, on the brief) *Amicus Curiae* for Equal Employment Opportunity Commission in Docket Nos. 96-7920 and 96-9004(CON).

(Edward Copeland, Cary Lacheen, New York Lawyers for the Public Interest, New York, New York, Robert L. Schonfeld, Stein & Schonfeld, New York, New York *Amicus Curiae* for American Civil Liberties Union, et al. in Docket Nos. 96-7920 and 96-9004(CON)).

(Richard A. Dienst, Leslie H. Ben-Zvi, Dienst & Serrins, LLP, New York, New York, for *Defendants-Appellees* Detectives' Endowment Association, Captains' Endowment Association, Sergeants' Benevolent Asso-

ciation and Lieutenants' Benevolent Association, New York City Police Department in Docket Nos. 96-7920 and 96-9004(CON)).

KEVIN P. FITZPATRICK, Williston Park, New York, (Kevin P. Fitzpatrick, P.C., Williston Park, New York, Martin N. Silberman, Marc Alain Steier, Silberman & Rhine, P.C., New York, New York, on the brief) for *Plaintiffs-Appellants* in Docket No. 96-9257.

JAMES J. DWYER, New York, New York, (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, Pamela Seider Dolgow, Anshel David, Marta B. Soja, of counsel, on the brief) for *Municipal Defendants-Appellees* in Docket No. 96-9257.

TINA KREMENEZKY, New York, New York, (Richard M. Betheil, Pryor, Cashman, Sherman & Flynn, New York, New York, joining in the brief for Municipal Appellees) for *Defendant-Appellee* Uniformed Fire Officers Association and Uniformed Fire Officers Association Executive Board in Docket No. 96-9257.

MICHAEL N. BLOCK, New York, New York (Sullivan & Liapakis, New York, New York) for *Defendants-Appellees* Uniformed Firefighters Association and Trustees in Docket No. 96-9257.

(Daniel T. Campbell, P.C., Daniel T. Campbell, Floral Park, New York, for *Amicus Curiae* COAPP-VSF, Inc. in Docket No. 96-9257.)

MARTIN N. SILBERMAN, New York, New York (Silberman & Rhine, P.C., New York, New York, Kevin P. Fitzpatrick, Kevin P. Fitzpatrick, P.C., Williston Park, New York, on the brief) for *Plaintiffs-Appellants* in Docket No. 96-9289.

JAMES J. DWYER, New York, New York, (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, Pamela Seider Dolgow, Anshel David, Marta B. Soja, of counsel, on the brief) for *Municipal Defendants-Appellees* in Docket No. 96-9289.

TINA KREMENEZKY, New York, New York, (Richard M. Betheil, Pryor, Cashman, Sherman & Flynn, New York, New York) for *Defendant-Appellee* Uniformed Fire Officers Association and Uniformed Fire Officers Association Executive Board in Docket No. 96-9289.

MICHAEL N. BLOCK, New York, New York (Sullivan & Liapakis, New York, New York) for *Defendants-Appellees* Uniformed Firefighters Association and Trustees in Docket No. 96-9289.

(Dennis C. Vacco, Attorney General of the State of New York, New York, New York, Barbara G. Billet, Solicitor General, Thomas D. Hughes, Assistant Solicitor General, Martin Bienstock, Assistant Attorney General, Of Counsel, New York, New York, for *State Defendants-Appellees* in Docket No. 96-9289.)

JOHN A. CLIFFORD, *Pro Se*, Long Beach, New York in Docket No. 96-9601.

JAMES J. DWYER, New York, New York (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, of counsel) for *Municipal Defendants-Appellees* in Docket No. 96-9601.

SERAFINO F. VELARDI, *Pro Se*, Port St. Lucie, Florida in Docket No. 96-9237.

JOHN HOGROGIAN, New York, New York (PAUL A. CROTTY, Corporation Counsel of the City of New York, New York, New York) for *Defendant-Appellee* in Docket No. 96-9237.

WALKER, *Circuit Judge*:

In this appeal, various classes of police and fire officers in New York City who retired with disability pensions press their claims, rejected below, that the city and applicable pension funds are discriminating against them by denying them benefits from more lucrative variable supplement funds ("VSF") that are available only to retirees who retire after twenty years of service and who do not already receive disability pensions. This appeal also presents the threshold issue of whether a retiree on disability who is presently unable to perform the "essential functions" of his former employment can still be a "qualified individual with a disability" within Title I of the Americans with Disabilities Act for the purpose of challenging alleged discrimination in the provision of fringe benefits. We answer this threshold question in the affirmative; however, with one exception we agree with the district courts that there is no disability discrimination in these cases and thus the motions to dismiss by defendants-appellees were properly granted. We also address and reject appellants' various arguments challenging the VSF statutory scheme

under the United States Constitution and other federal statutes.

The following are the different groups of appellants, the judgments they have appealed from, and their claims before this court.

Plaintiffs-appellants Peter Castellano *et al.* ("Castellano appellants") appeal from the June 28, 1996 judgment by the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), their complaint under Titles I and II of the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. § 12101 *et seq.*, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. § 621 *et seq.*, the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and various claims under New York law. (No. 96-7920). *See Castellano v. City of New York*, 946 F. Supp. 249 (S.D.N.Y. 1996).

Plaintiffs-appellants Ronald Graboski *et al.* ("Graboski appellants") and Serafino F. Velardi ("Velardi") appeal from the September 5, 1996 judgment by the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), the Graboski appellants' complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the ADEA, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, and various claims under New York law, (No. 96-9257), and dismissing Velardi's complaint under Title I of the ADA. (No. 96-9237). *See Graboski v. Giuliani*, 937 F. Supp. 258 (S.D.N.Y. 1996).

Plaintiffs-appellants Alphonse Adornetti *et al.* ("Adornetti appellants") appeal from the September 9, 1996 judgment by the United States District Court for the Eastern District of New York (Eugene H. Nickerson, *Judge*) dismissing, pursuant

to Fed. R. Civ. P. 12(b)(6), their complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, the Takings Clause, and various claims under New York law. (No. 96-9289). *See Adornetti v. New York City Employees' Retirement Sys.*, No. 95-CV-3842, 1996 WL 518097 (E.D.N.Y. Aug. 28, 1996).

Plaintiffs-appellants John A. Clifford *et al.* ("Clifford appellants") appeal from the March 6, 1997 judgment by the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), their complaint under Title I of the ADA. (No. 96-9601). *See Clifford v. New York City Police Pension Fund*, No. 96-CV-6806 (S.D.N.Y. Mar. 6, 1997).

Plaintiff-appellant Peter Harris ("Harris") appeals from the July 17, 1996 judgment by the United States District Court for the Southern District of New York (Kevin Thomas Duffy, *Judge*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), Harris's complaint under Title I of the ADA. *See Houlihan v. City of New York*, No. 95-CV-6373, 1996 WL 393576 (S.D.N.Y. July 15, 1996). Harris's appeal has been consolidated with the Castellano appeal, is included in the Castellano caption, and has the docket number 96-9004. Harris's ADA claim is considered together with that of the Castellano appellants.

We affirm all of the above judgments (Nos. 96-7920, 96-9257, 96-9289, 96-9601, 96-9004) except for the judgment dismissing Velardi's complaint (No. 96-9237), which we vacate and remand for further proceedings.

Background

We set forth here only as much background as is necessary to the disposition of these appeals, all of which relate to the administration of VSFs to various classes of New York City police and fire officers.

A VSF benefit is a variable supplemental benefit disbursed to certain city retirees in addition to regular pension or retirement benefits, and funded by the investment earnings of various police and fire officer pension funds. *See, e.g.*, N.Y.C. Admin. Code ("Code") §§ 13-232, 13-335. There are five VSFs relevant to these consolidated appeals: Code at § 13-268 to § 13-278 (police officers' VSF), § 13-278 to § 13-287 (police superior officers' VSF), § 13-382 to § 13-391.1 (firefighters' VSF), § 13-392 to § 13-401 (fire officers' VSF), and § 13-191 to § 13-193.5 (transit police officers' VSF). With the exception of the transit police officers' VSF, these VSFs originated directly from collective bargaining agreements ("CBAs") adopted in 1968 and 1970 between a number of police and fire officer associations and New York City, and implemented into law in 1970.

For all of the above classes of police and fire officers, there exist three basic types of retirement plans: (1) "ordinary disability" retirement for those who are "physically or mentally incapacitated for the performance of duty and ought to be retired," Code at §§ 13-251, 13-352; (2) "accident disability" retirement for those whose physical or mental incapacitation is a "natural and proximate result" of city-service, Code at §§ 13-252, 13-353; and (3) "for service" retirement for those who have served for twenty years and who do not elect to retire with disability benefits. Code at §§ 13-246, 13-247, 13-349, 13-350. Only "for service" retirees are eligible for VSF benefits. Code at §§ 13-268, 13-278, 13-382, 13-392. In addition, only retirees who retired after various VSF-eligibility dates (that differ among the VSFs) may receive VSF benefits.

In recent years, the VSFs have been steadily increasing in value, thereby increasing the relative amount of total payments received by "for service" retirees as compared with retirees under disability plans and retirees who retired before the applicable VSF-eligibility effective dates. Appellants now assert an entitlement, under federal and New York statutes and the United States Constitution, to a piece of the growing

VSF pie. The following are the material facts unique to the separate appellant groups.

A. *Castellano v. City of New York* (No. 96-7920)

The factual background in this case is extensively set forth in *Castellano v. Board of Trustees of the Police Officers' Variable Supplements Fund*, 937 F.2d 752 (2d Cir. 1991), and *Castellano v. City of New York*, 946 F. Supp. 249 (S.D.N.Y. 1996). The Castellano appellants are approximately 2,000 disabled retired New York City police officers who receive benefits from the New York City Police Pension Fund, but who retired with "ordinary" or "accident disability" and are therefore ineligible to receive VSF benefits. Only "for service" retirees who retired on or after October 1, 1968 are eligible to receive VSF benefits. Code at §§ 13-268(5), 13-278(5).

Appellants fall into two broad groups: disabled retirees who did not satisfy the twenty-year service requirement for receiving VSF benefits ("Class I retirees"); and retirees who served for twenty years but whose voluntary election to retire with disability precluded them from receiving additional "for service" VSF benefits ("Class II retirees"). Although it is undisputed that the Castellano appellants are receiving the retirement benefits to which they are entitled by the Code, they assert two principal federal claims to an entitlement to the VSF benefits: first, that the exclusion of both Class I and Class II retirees from VSF-benefit eligibility constitutes discrimination on the basis of disability in violation of Titles I and II of the ADA and section 504 of the Rehabilitation Act; and second, that the statutory limitation of VSF payments to those who retired on or after October 1, 1968 violates the ADEA. In dismissing appellants' complaint, pursuant to Fed. R. Civ. P. 12(b)(6), the district court rejected these claims. The Castellano appellants also assert various New York state law claims over which the district court declined to exercise supplemental jurisdiction. *See id.*

B. *Graboski Appellants* (No. 96-9257)

The factual background in this case is extensively set out in *Graboski v. Giuliani*, 937 F. Supp. 258 (S.D.N.Y. 1996). The Graboski appellants are disabled retired New York City firefighters and fire officers who are not eligible to receive VSF benefits from the New York City Fire Department Pension Fund. The firefighter and fire officer VSFs originated in CBAs adopted on October 1, 1968 and June 2, 1970 between the Uniformed Firefighters' Association ("UFA") and Uniformed Fire Officers' Association ("UFOA") and New York City. In 1970, these CBAs were implemented into law. *See* Act of May 18, 1970, 1970 N.Y.Laws ch. 877, §§ B19-43.0, B19-63.0. The legislature has since made further changes to the statutory scheme, including limiting VSF payments to those who retired on or after October 1, 1968. *See, e.g.*, Act of July 26, 1993, 1993 N.Y.Laws ch. 480; Code at § 13-392(6).

The Graboski appellants comprise three groups: Class I retirees—retirees with "ordinary" or "accidental" disability pensions who served less than twenty years, Class II retirees—retirees with twenty years of service who elected to retire with disability retirement, and retirees ineligible for VSF benefits because they retired before October 1, 1968. The Graboski appellants assert three principal federal claims: first, that the exclusion of both Class I and Class II retirees from VSF-benefit eligibility discriminates against them on the basis of disability in violation of Titles I and II of the ADA and section 504 of the Rehabilitation Act; second, that the statutory limitation of VSF payments to those who retired on or after October 1, 1968 violates the ADEA; and finally, that under the CBAs disability retirees were contractually intended to be VSF beneficiaries and that various later amending legislation restricting VSF-benefit eligibility violates the Contract and Equal Protection Clauses of the United States Constitution. In dismissing appellants' complaint, pursuant to Fed. R. Civ. P. 12(b)(6), the district court rejected

these claims. *See Graboski v. Giuliani*, 937 F. Supp. 258, 270 (S.D.N.Y. 1996). The Graboski appellants also assert various New York state law claims over which the district court declined to exercise supplemental jurisdiction. *See id.*

C. *Adornetti Appellants* (No. 96-9289)

The factual background in this case is set out in *Adornetti v. New York City Employees' Retirement Sys.*, No. 95-CV-3842, 1996 WL 518097, at *1 (E.D.N.Y. Aug. 28, 1996). Appellants are approximately 800 former New York City Transit Police officers who are ineligible to receive benefits from the transit police officers' VSF. *See generally*, Code at § 13-191 to § 13-193.5 (Code provisions relating to transit police officers' VSF).

The transit police officers' VSF, according to the Adornetti appellants, originated in a CBA adopted in 1968 between the Patrolman's Benevolent Association ("PBA") and New York City. Although that CBA by its terms did not apply to transit police officers (but rather to members of another police pension fund), appellants claim a contractual entitlement to whatever benefits the CBA conferred, pursuant to § 13-157(j)(2) of the Code. In 1987, the transit police officers' VSF, explicitly limiting VSF-benefit eligibility to "for service" retirees, was implemented into law. *See* Act of Aug. 10, 1987, 1987 N.Y.Laws ch. 844. The transit police VSF-eligible effective date is July 1, 1987. *See* Code at § 13-191(1)(c).

The Adornetti appellants fall into three groups: Class I retirees—disabled retirees who served less than twenty years, Class II retirees—disabled retirees with twenty years of service who elected to retire with disability retirement, and retirees ineligible to receive VSF benefits because they retired before July 1, 1987. Before the district court, the Adornetti appellants claimed entitlement to VSF benefits under Title I of the ADA, section 504 of the Rehabilitation Act, the Contract, Equal Protection, and Takings Clauses of the United States Constitution, and under various New York state law

causes of action. In dismissing the Adornetti appellants' complaint pursuant to Fed. R. Civ. P. 12(b)(6), the district court adopted the reasoning of the district court in *Castellano v. City*, 946 F. Supp. at 249, rejected appellants' federal claims, and declined to exercise supplemental jurisdiction over their New York claims. *See Adornetti*, 1996 WL 518097, at *1-2. Before this court, appellants assert only the ADA, Rehabilitation Act, Contract Clause, and New York state law claims.

D. *The Clifford Appellants* (No. 96-9601)

The Clifford appellants are six former New York City police officers who are ineligible to receive VSF benefits either because they have not completed twenty years of service (Class I retirees) or because they retired with disability after twenty years of service (Class II retirees). Because their claim under Title I of the ADA is identical to that of the Castellano appellants, Judge Stein adopted the reasoning of his opinion in *Castellano v. City of New York*, 946 F. Supp. at 249, in dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), the Clifford appellants' ADA claim. *See Clifford v. New York City Police Pension Fund*, No. 96-CV-6806 (S.D.N.Y. Mar. 6, 1997).

E. *Velardi Case* (No. 96-9237)

Velardi alleges that he served twenty years as a firefighter and that the New York City Fire Department ("NYFD") Pension Fund discriminated *among* twenty-year retirees on the basis of disability, denying "additional [VSF] benefit[s]" only to himself and other disabled firefighter retirees in violation of Title I of the ADA. Record on Appeal ("ROA") No. 96-9237, doc. 1 at 5. After Velardi moved for summary judgment, NYFD moved to dismiss Velardi's complaint under Rule 12(b)(6), claiming (i) that Velardi was not a "qualified individual with a disability" within Title I because he could no longer perform the essential functions of his former employment, and (ii) that the VSF scheme discriminates not

on the basis of disability, but on the basis of years served. Although Velardi claimed that he did not apply for "for service" retirement because it was never offered to him and he was unaware of the option, *see* ROA No. 96-9237, doc. 46 at 35, Judge Kaplan consolidated Velardi's case with the Graboski case and, finding Velardi on "equal footing" with the Graboski appellants, *Graboski*, 937 F. Supp. at 268, granted NYFD's Fed. R. Civ. P. 12(b)(6) motion to dismiss Velardi's complaint. Velardi now appeals.

Discussion

I. *Standard of Review*

This court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), *see Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996), and will affirm such a dismissal only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) (internal quotation marks and citation omitted). We must take "as true the facts alleged in the complaint and draw[ ] all reasonable inferences in the plaintiff's favor." *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699-700 (2d Cir. 1994).

II. *The ADA and Rehabilitation Act Claims: "Qualified Individuals" under Title I*

All appellants in these actions allege federal disability claims pursuant to Title I of the ADA and, with the exception of the Clifford appellants and Velardi, all allege claims under Title II of the ADA and section 504 of the Rehabilitation Act.

The district courts in the cases before us are divided over whether appellants, all of whom are former city employees and most of whom who can no longer perform the "essential functions" of their former employment, are "qualified individual[s] with a disability" within Title I of the ADA for the

purpose of challenging alleged discrimination in employer-related fringe benefits. *See Castellano v. City of New York*, 946 F. Supp. at 252-53; *Graboski*, 937 F. Supp. at 266. Title I prohibits an employer or labor organization from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment," 42 U.S.C. § 12112(a), including the provision of fringe benefits. *See* 42 U.S.C. § 12112(b)(2). "Qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

In *Castellano v. City*, the district court determined that disabled retirees, who no longer "hold[ ]" "employment position[s]" and who can no longer "with or without reasonable accommodation . . . perform the essential functions" of their former employment, do not fall within the plain language of the ADA. 946 F. Supp. at 252-53 (citing 42 U.S.C. § 12111(8)). Appellees urge us to endorse this approach, which has been adopted by three circuits in the context of challenges to alleged discrimination in the provision of fringe benefits. *See Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1526-28 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1042-45 (7th Cir. 1996); *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 185-87 (6th Cir. 1996), *aff'd*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 1998 WL 15861 (1998). Title I of the ADA, however, expressly prohibits discrimination in the provision of fringe benefits, *see* 42 U.S.C. § 12112(b)(2), and certain fringe benefits such as pensions and VSF benefits are provided only post-employment and are meaningful only in that context. This led the district court in *Graboski* to conclude that it would be illogical for the ADA to exclude the period

following employment just "when the employment benefits are to be reaped." *Graboski*, 937 F. Supp. at 266.

In interpreting a statute, we first consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). Where the language is ambiguous, we focus upon the "broader context" and "primary purpose" of the statute. *Id.* at 848. Section 12111(8) defines a "qualified individual with a disability" as an individual "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). It fails to specify *when* a potential plaintiff must have been a "qualified individual with a disability" in the context of a claim that the provision of retirement or fringe benefits is discriminatory. The House committee report accompanying the ADA adds that a "determination of whether a person is qualified should be made at the time of the [discriminatory] employment action, *e.g.* hiring or promotion, and should not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future," H.R. Rep. No. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 456, and in doing so, focuses on the situation where the inability to perform essential functions may not have arisen at the time of the discriminatory employment action.

The cases *sub judice*, however, involve employment actions taken not only after the plaintiffs were no longer employees but after many of the plaintiffs had lost the ability to perform the essential functions of their former employment. A literal reading of the committee report suggests that "at the time of the employment action" refers to the actual moment when the employer performs the discriminatory act, in this case, withholds or provides unequal fringe benefits. Such a reading, however, would permit employers to discriminate freely against disabled retirees who had been "qualified individuals"

up to the point of retirement, but who (i) no longer held employment positions, and/or (ii) were no longer able to perform the essential functions of their former employment due to infirmity. Under reading (i), for example, an employer could terminate an employee in violation of the ADA and then deny him fringe benefits, yet the employee could bring no ADA claim for the latter violation because at the time of the discriminatory denial of fringe benefits he was a former employee who did not "hold" an "employment position." The first reading would also permit an employer to deny post-employment fringe benefits on the basis of disability to any retiree the day after (but not the day before) his retirement. Reading (ii) would permit irrational discrimination as between disabled retirees, some of whom (for whatever reason) could still perform the essential functions of their former employment and others of whom could not. This analysis only underscores the difficulty of defining any temporally discrete, discriminatory "employment action" in the context of the provision of fringe benefits. The fact is that many fringe benefits are earned during years of service before the employment has terminated but are provided in years after the employment relationship has ended.

Looking beyond this inconclusive and unsatisfactory legislative history, we turn to the purpose underlying inclusion of the "essential functions" requirement within the definition of "qualified individual with a disability." Congress has stated its purpose to be "to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in question." H.R. Rep. No. 101-485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 337; S. Rep. No. 101-116, *reprinted in* Arnold & Porter Legislative History P.L. 101-336, Americans with Disabilities Act of 1989, at 26 (1989). Congress used the phrase "qualified individual with a disability" to "reaffirm that [the ADA] does not undermine an employer's ability to choose and maintain qualified workers," *id.*; H.R. Rep. No. 101-485(II), at 55

(1990), *reprinted in* 1990 U.S.C.C.A.N. 337, and to allow employers to "select the most qualified applicant available" rather than be obliged to "prefer applicants with disabilities over other applicants on the basis of disability." H.R. Rep. No. 101-485(II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 338; S. Rep. No. 101-116, *reprinted in* Arnold & Porter Legislative History P.L. 101-336, Americans with Disabilities Act of 1989, at 26-27 (1989). Congress was concerned that employers not be forced to hire, promote, or retain unqualified, disabled employees.

Where the alleged discrimination relates to the provision of post-employment benefits, rather than to hiring, promotion, or firing, Congress's expressed concern about qualifications is no longer implicated. Because retired employees who receive fringe benefits no longer work or seek to work for their former employers, they plainly need not perform the essential functions, or indeed *any* functions, of their former employment. Provided that retired employees were qualified (i.e., performed the "essential functions" of their jobs) while employed and on that basis became entitled to post-employment benefits, the purpose of the "essential functions" requirement has been met. In the instant case, appellants who performed the "essential functions" of their former employment for a period of twenty years and who selected a "for service" retirement plan would be entitled under the ADA to non-discriminatory treatment in the provision of VSF benefits. Because fringe benefits are earned for actual service in employment, it is irrelevant whether former employees, otherwise eligible for fringe benefits, could *also* perform such essential functions at or after termination of their employment.

We note that the Seventh Circuit distinguished post-employment benefits claims from Title VII antiretaliation claims (where concededly former employees had standing) on the ground that the "protected interest of the former employee [in not facing post-employment retaliation] arose during the period of employment" only in the latter case. *CNA*, 96 F.3d

at 1045. It is plain to us, however, that an employee's entitlement to post-employment fringe benefits arises (as much or more so than does his interest in not facing post-employment retaliation) during his period of employment.

An interpretation that would prevent former employees who are no longer "qualified individuals" from bringing claims of discrimination in the provision of post-employment fringe benefits would also undermine the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination in the provision of fringe benefits. *See* 42 U.S.C. §§ 12112(a), (b)(2). Many fringe benefits are paid out to those who no longer work and who are no longer able to work, and some fringe benefits are paid out to individuals precisely because they can no longer work. Under appellees' reading, none of these individuals would be protected by the ADA. Appellees' reading would also undermine the ADA's broad remedial purpose to prohibit disability discrimination in all aspects of the employment relationship, leaving disabled retirees unprotected from discrimination in the provision of pensions, health and life insurance, and other post-employment benefits. *See* 42 U.S.C. §§ 12101(a), (b)(1) ("It is the purpose of this chapter—to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.").

Support for our conclusion can be found in the Supreme Court's recent decision in *Robinson*, 117 S. Ct at 843. *Robinson* was handed down in 1997 after the district court decisions in *Castellano* and *Graboski* and the decisions by the Sixth, Seventh, and Eleventh Circuits in *Parker*, *CNA*, and *Gonzalez*. The Supreme Court held, consistent with Title VII's text and broad remedial purpose, that section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a)—an antiretaliation provision which prohibits an employer from discriminating "against any of his employees or applicants for employment"—protects former employees as well, even though "former" employees are nowhere mentioned in that section. *Id.* at 849. Notably, with

an exception not applicable here, the definition of "employee" under the ADA parallels that under Title VII and was intended to be given the "same meaning." 29 C.F.R. pt. 1630, App. at 349 (1997) (commenting on 29 C.F.R. 1630 pt.2(a)-(f)); *see also* H.R.Rep. No. 101-485(II), at 54, 76, 149, *reprinted in* 1990 U.S.C.C.A.N. 336, 359, 432 (Title I incorporates by reference Title VII's definition of "employee"); 42 U.S.C. § 12111(4); 42 U.S.C. § 2000e(f).

The Court in *Robinson* first determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" that the language of section 704(a) of Title VII is ambiguous and then interpreted the statutory language in light of the purposes of section 704(a) and Title VII. *Robinson*, 117 S. Ct. at 846. The Court concluded that a crabbed interpretation excluding "former employees" from the protections of Title VII antiretaliation provisions would have undermined their "primary purpose . . . : [m]aintaining unfettered access to statutory remedial mechanisms." *Id.* at 848. This reasoning applies with equal force to the instant case. An interpretation excluding from the ADA former employees or employees who can no longer perform the essential functions of their former employment would undermine the purpose of preventing disability discrimination in the provision of fringe benefits. *See also Brown v. New York State Teachers' Retirement Sys.*, 834 F.2d 299, 300 (2d Cir. 1987) (Title VII challenge by two retired women teachers to pension and annuity benefits determined by sex-distinct mortality tables); *Pantchenko v. C. B. Dolge Co.*, 581 F.2d 1052, 1054-55 (2d Cir. 1978) (construing "employee" in Title VII to include former employees in light of statute's purpose "to furnish a remedy against an employer's use of discrimination in connection with a prospective, present or past employment relationship to cause harm to another."); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991) (" '[t]here is no ground for affording any less protection [against retaliation] to defendant's former employees than to its present employees' under Title

VII.") (quoting *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1166 (10th Cir. 1977)).

We note that the EEOC has, in the context of fringe benefits, taken the position that "qualified individual[s]" include former employees who can no longer perform the "essential functions" of their former employment. *See* Amicus Curiae Brief for the EEOC, *Castellano v. City of New York*, No. 96-7920. As evidenced by the ADA's language and legislative history, it is inconceivable to us that Congress would in the same breath expressly prohibit discrimination in fringe benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be "qualified" at or after their retirement, although they had earned those fringe benefits through years of service in which they performed the essential functions of their employment.

The narrow interpretation sought by appellees in the instant actions would permit employers to deny VSF benefits on the basis of disability to retirees with twenty years of service who elected to retire "for service," either the day after their retirement or in any event as soon as they could no longer perform the "essential functions" of their former employment. In light of the textual ambiguity surrounding the time at which a plaintiff must have been a "qualified individual," the purpose of the "essential functions" requirement, the illogic inherent in a statutory prohibition of discrimination in the provision of fringe benefits that would exclude a large body of retirees from coverage, and the ADA's broad remedial purpose, we hold that a former employee with a disability who "with or without reasonable accommodation" could "perform the essential functions of the employment position" for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e., who is otherwise entitled to receive a fringe benefit) is a "qualified individual with a disability" within Title I of the ADA for the purpose of challenging alleged discrimination in the provision of that fringe benefit.

Because the claims of all appellants alleging violations of section 504 of the Rehabilitation Act and Title II of the ADA can easily be disposed of on the merits, we assume without deciding that these appellants are also "qualified individuals" within the meaning of those provisions.

III. *The ADA and Rehabilitation Act Claims: "Because of Disability"*

Having determined that all of the appellants have met the threshold "qualified individual" requirement with respect to their Title I ADA challenge, we turn to the question of whether the VSF statutory scheme discriminates on the basis of disability.

A. *Retirees With Less Than Twenty Years of Service (Class I Retirees)*

Some of the Castellano, Graboski, Adornetti, and Clifford appellants served less than twenty years but nevertheless claim entitlement to the VSF benefits under the ADA and Rehabilitation Act. These Class I retirees assert in substance that the ADA entitles a disabled person who retires after ten, or even two, years to receive the same pension as a twenty-year retiree. Titles I and II of the ADA and section 504 of the Rehabilitation Act, however, prohibit discrimination only on the basis of disability. *See* ADA Title I, 42 U.S.C. § 12112 (prohibiting discrimination against a "qualified individual with a disability because of the disability of such individual"); ADA Title II, 42 U.S.C. § 12132 (prohibiting discrimination against a "qualified individual with a disability . . . by reason of such disability"); Rehabilitation Act § 504, 29 U.S.C. § 794 (prohibiting discrimination against an "otherwise qualified individual with a disability . . . solely by reason of her or his disability.").

The Class I retirees are similarly situated not with twenty-year "for service" retirees, but with non-disabled retirees who retire after an equivalent period of service. Because the latter

group is not entitled to VSF benefits, there is no unlawful discrimination. As noted by the EEOC, "[w]here an employer offers . . . a service retirement plan, there is no ADA violation as long as the service retirement plan treats persons who are covered by the ADA the same as other employees." EEOC Notice No. 915.002 "Questions and Answers About Disability and Service Retirement Plans Under the ADA," May 11, 1995, at 2. In rejecting an ADA, Title II challenge to the VSF scheme by retired New York City Housing and Transit police officers, the New York Court of Appeals has also stated:

> Eligibility for the benefits of VSF membership require [sic] a minimum of 20 years accredited service. Such a requirement precludes from benefits only officers with less than 20 years of credited service, not those who retired because of a disability. Consequently, the for service eligibility requirement does not discriminate against or burden disabled individuals in a manner different from or greater than the burdens it places on nondisabled individuals.

Gagliardo v. Dinkins, 674 N.E.2d 298, 304 (1996). This analysis applies to the Class I retirees' Rehabilitation Act claims. *See Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1515 (2d Cir. 1995); 29 U.S.C. § 794(d) ("The standards used to determine whether [section 504 of the Rehabilitation Act] has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under title I of the [ADA] . . . ."). Because VSF payments are available equally to persons with and without disabilities who retire after twenty years of service, Class I retirees have failed to state a claim of discrimination on the basis of disability under the ADA or the Rehabilitation Act.

Nor, as noted by the EEOC, does the ADA "require that service retirement plans and disability retirement plans provide the same level of benefits, because they are two separate benefits which serve different purposes." EEOC Notice No.

915.002 at 2. The ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent amount of service. *Cf. Alexander v. Choate*, 469 U.S. 287, 301 (1985).

B. *Retirees With Twenty Years of Service Who Retired Under a Disability Plan (Class II Retirees)*

The Class II disabled retirees served for twenty years as police officers, transit police officers, firefighters, or fire officers and elected, under the statutory scheme, to retire under the disability and not the "for service" plan. All of the Class II retirees concede that they chose voluntarily to forego "for service" in favor of disability retirement, but nevertheless argue that they are entitled under the ADA and Rehabilitation Act to "for service" benefits in addition to their disability benefits. We disagree.

Although the ADA is violated where "persons covered by the ADA who qualify for both a service retirement and disability retirement plan are required to take a disability benefit which is less advantageous," EEOC Notice No. 915.002 at 3, nothing in the ADA requires an employer to provide to disabled employees the VSF benefits of a service plan *in addition to* freely-chosen disability benefits under a disability plan. *See Felde v. City of San Jose*, 839 F. Supp. 708, 710 (N.D. Cal. 1994), *aff'd mem.*, 66 F.3d 335 (9th Cir. 1995) (employee afforded choice of regular and allegedly inferior disability retirement plans was given additional option of disability plan and not excluded from any retirement plan on the basis of disability); *cf. Choate*, 469 U.S. 287, 301 (no discrimination under Rehabilitation Act where state provides equal access to health care for all individuals).

C. *Deferred Compensation and the ADA Claim*

The Graboski appellants point to an isolated statement in the New York Court of Appeals opinion in *Gagliardo* for the proposition that the statutory scheme entitles police officers

and firefighters to VSF benefits regardless of disability status. In rejecting a claim that the VSF benefits constituted an unconstitutional gift under Article VIII, § 1 of the New York State Constitution, the New York Court of Appeals in *Gagliardo* stated:

> The [VSFs] were created through collective bargaining as *additional future compensation for services actually rendered by police officers* within the bargaining unit during the life of the agreement. In addition, these supplemental benefit payments also serve the important purpose of attracting and retaining qualified candidate-officers and providing an inducement to remain in active police service.

Gagliardo, 674 N.E.2d at 303 (emphasis added). Because VSF payments are not retirement benefits but rather deferred compensation under New York law, appellants argue, the statutory scheme denies this earned but deferred compensation only to disabled employees who are unable to complete twenty years of service. The above statement in *Gagliardo*, however, disposed of a claim that the VSFs violated the gift ban of the New York Constitution and did not address an ADA claim. The court's further characterization of the VSFs as "inducement[s] to remain in active . . . service" undermines appellants' position that the benefits constitute deferred compensation. *Id.* The fact that the level of VSF benefits does not vary by years served is a further indication that the VSF is not bargained-for compensation for services rendered. In light of *Gagliardo*'s ultimate holding that the VSF program does not violate Title II of the ADA, the above statement taken in context does not support appellants' ADA claim.

D. *Velardi's Title I ADA Claim*

Velardi is neither a Class I nor Class II retiree. Seen in the light most favorable to Velardi, Velardi's complaint alleges that he served twenty years as a firefighter and that the NYFD Pension Fund discriminated as between twenty-year retirees

on the basis of disability, denying "additional [VSF] benefit[s]" only to himself and other disabled firefighter retirees. ROA No. 96-9237, doc. 1 at 5. The NYFD moved to dismiss Velardi's complaint under Fed. R. Civ. P. 12(b)(6), claiming (i) that Velardi was not a "qualified individual with a disability" within Title I because he could no longer perform the essential functions of his former employment, and (ii) that the VSF scheme discriminates only on the basis of years served, not on the basis of disability. The motion to dismiss failed to address Velardi's factual allegation that after twenty years of service he had been forced to retire with disability rather than "for service."

Velardi's response to NYFD's motion again claimed that, unlike Class II retirees, he "was required to retire on an ordinary disability," ROA No. 96-9237, doc. 11 at 5, and that it was "wrong for a disabled person to receive far less benefits than what is given to a service retiree with the same time served." ROA No. 96-9237, doc. 10 at ¶ 20. At oral argument before the district court, Velardi stated that he did not apply for "for service" retirement because it was never offered to him and he was unaware of the option. ROA No. 96-9237, doc. 46 at 35. Judge Kaplan then consolidated Velardi's case with the Graboski case and, finding Velardi on "equal footing" with the Graboski appellants, *Graboski*, 937 F. Supp. at 268, granted NYFD's Fed. R. Civ. P. 12(b)(6) motion to dismiss Velardi's complaint.

Velardi's complaint alleges a valid cause of action under Title I of the ADA. First, we have now held that Velardi is a "qualified individual with a disability" within Title I of the ADA. Second, unlike the Class II retirees who knew of and freely chose "for service" retirement, Velardi's complaint alleges that the NYFD required him to retire on ordinary disability, even though as a twenty-year retiree he was qualified to receive benefits under the "for service" plan. The ADA is violated where "persons covered by the ADA who qualify for both a service retirement and disability retirement plan are

required to take a disability benefit which is less advantageous." EEOC Notice No. 915.002 at 3. It is unclear on the record before us whether in fact Velardi was forced by NYFD to forego "for service" benefits, in that the NYFD failed to inform Velardi of the "for service" retirement option. If such a failure occurred, it would be sufficient to establish Velardi's Title I ADA claim. At the pleading stage when events are seen in the light most favorable to Velardi, *see Jackson*, 32 F.3d at 699-700, we cannot equate Velardi with the Class II Graboski appellants, who chose to retire with disability and who now request "for service" benefits as well. We therefore vacate the judgment of the district court insofar as it dismissed Velardi's complaint pursuant to Fed. R. Civ. P. 12(b)(6).

IV. *ADEA*

The Castellano and Graboski appellants who retired before October 1, 1968 and are therefore ineligible to receive VSF benefits allege that, in violation of the ADEA, they were denied VSF benefits "solely because [they] retired prior to [the effective date of VSF implementation] and are older than those . . . receiving the privilege." This claim is frivolous. First, the Castellano appellants are barred from asserting an ADEA claim because they failed to file an ADEA complaint with the EEOC sixty days before commencement of the civil action in district court, as required by 29 U.S.C. § 626(d). *See Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 23-26 (2d Cir. 1985). Second, because the Graboski appellants failed to raise the ADEA issue on appeal, they have abandoned it. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995); Fed. R. App. P. 28(a)(6) (appellant's brief "must contain the contentions of the appellant on the issues presented.")

Finally, even if the Castellano and Graboski appellants' claims were still alive, their factual allegation that they are "older" than other officers receiving VSF benefits, without

more, is insufficient to state an ADEA claim. *See, e.g., Dugan v. Martin Marietta Aerospace*, 760 F.2d 397, 399 (2d Cir. 1985) (stating basic elements of ADEA prima facie case). Just as the ADEA does not mandate that "any improvements to a pension plan [be applied] retroactively to any active employees for past services," *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 572 F. Supp. 1494, 1506 (N.D. Ill. 1983), *aff'd*, 756 F.2d 1274 (7th Cir. 1985), the ADEA plainly does not require that any improvements in retirement benefits be applied retroactively to past employees who retired under different terms.

V. *Contract Clause Claim*

Various appellants claim that, by denying them VSF benefits, various appellees have impaired their rights under the Contract Clause, Article I, Section 10 of the Constitution.

A. *Adornetti Appellants' Claim*

The Adornetti appellants claim that the VSF implementing legislation, 1987 N.Y.Laws ch. 844, limiting VSF-benefit eligibility to "for service" retirees, impaired their contractual rights to VSF benefits created in a 1968 collective bargaining agreement ("CBA") between the Patrolman's Benevolent Association and New York City. That CBA states: "The purpose of [the VSF] shall be to provide a supplemental benefit on a variable annuity basis, for Articles I and II, as determined by the trustees." *Castellano v. Board*, 937 F.2d at 754. Although that CBA by its terms did not apply to transit police officers (but rather to members of another police pension fund), appellants claim entitlement to the contractual rights to the VSF benefits that the CBA allegedly conferred, pursuant to § 13-157(j)(2) of the Code, which provides:

> [E]ach transit police member shall have and shall be entitled and subject to the same rights, benefits, privileges, and obligations as a member of the police force of the city who is a member of the police pension fund

> maintained pursuant to subchapter two of chapter two of this title, with respect to the matters provided for in [sixteen listed sections of the Code].

We express no opinion as to whether or not § 13-157(j)(2) confers upon transit police officers the benefits bestowed by the PBA's CBA, because we easily hold that, even if it did, the PBA's CBA creates no contractual entitlement to VSF benefits. Art. I, § 10 of the Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Where there is no contractual relationship, however, there can be no impairment. *See General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). This court has previously rejected a Contract Clause claim brought by police retirees based upon the same CBA, holding that the CBA plainly did not create any contractual obligation, but only established a general fund the beneficiaries of which were to be determined later by the legislature. *See Castellano v. Board*, 937 F.2d at 757. For the reasons stated in *Castellano v. Board*, we reject the Adornetti appellants' Contract Clause claim.

B. *Graboski Appellants' Claim*

The Graboski appellants claim that their VSF implementing legislation, 1970 N.Y.Laws chs. 876, 877, restricting eligibility for VSF benefits to "for service" retirees, impaired their contractual right to VSF payments created in their original CBAs between New York City and the UFA and UFOA. The UFA's and UFOA's CBA clauses allegedly creating this contractual right state: "The purpose of [the VSF] shall be to provide a supplemental benefit on a variable annuity basis for Article I and IB ["fire officer[s]" or "firemen,"] as determined by the trustees." UFA CBA, Article VII, Section 6; UFOA CBA, Article X, Section 6. Because this language is virtually identical to the language in the CBA that we held in *Castellano v. Board* did not create contractual rights to VSF bene-

fits, we reject this Contract Clause claim as well. *See Castellano v. Board*, 937 F.2d at 757.

The Graboski appellants next contend that the original VSF-implementing legislation, 1970 N.Y.Laws chs. 876, 877, itself created contractual rights in the VSF payments impaired by later amending legislation. For example, the original 1970 legislation defined the permissible class of VSF beneficiaries as, among others, "[a]ny person who receives a retirement allowance by reason of having retired from service . . . ." 1970 N.Y.Laws ch. 877 at §§ B19-40.00 subd. 5, B19-60.0 subd. 6. In 1972, the legislature amended "from service" to "for service," explicitly characterizing the amendment as a correction of a typographical error. *See* 1972 N.Y.Laws chs. 1011, 1012. This amending legislation, appellants contend, impaired the contractual rights of non-"for service" retirees to VSF benefits. We disagree.

The New York Court of Appeals rejected a similar challenge by police officer retirees, holding definitively that the original 1970 VSF-implementing legislation created no contractual obligation to disburse VSF payments under New York law. *See Ballentine v. Koch*, 674 N.E.2d 292, 297-98 (N.Y. 1996). According to that court, the statutory scheme for payments of VSF benefits is "highly conditional and discretionary"; no retiree could be "assured that funds for supplemental payments would be available, or that the payments, if made, would be of a certain amount or continue for any specified duration"; and "the statute itself expressly stipulated that it did not create any contractual rights as to the [VSF] payments." *Id.*; *See* Code at § 13-271(b)(2)(i) (Police officers' VSF: "The legislature hereby declares that [the VSFs] shall not create or constitute membership in a pension . . . system and *shall not create or constitute a contract with any pension fund beneficiary* . . . .") (emphasis added); *id.* at § 13-385(b)(2)(i) (same for firefighters' VSF); *id.* at § 13-395(b)(2)(i) (same for fire officers' VSF). Because, under the 1970 implementing legislation, firefighters and fire officers

are no more entitled to VSF benefits than were the police officers in *Ballentine*, any amending legislation affecting these appellants' VSF benefits—whether substantive or typographical—could not constitute an "impairment" in violation of the Contract Clause. *See General Motors*, 503 U.S. at 186.

VI. *Other Constitutional Claims*

The Graboski appellants claim that the statutory scheme's failure to provide payments to non-"for service" retirees violates the Equal Protection Clause of the Fourteenth Amendment. In our previous decision of *Castellano v. Board*, we easily disposed of this claim. *See Castellano v. Board*, 937 F.2d at 755-57. The statutory scheme bears a rational relationship to a government interest. As we held in *Castellano*, "[i]n allowing VSF payments only to 'for service' retirees, the city struck a balance between 'for service' and other retirees" in order to "serve[ ] the legitimate governmental interest of discouraging experienced members of the police force from seeking early retirement." *Id.* at 756.

The Castellano appellants contend further that the district court's failure to grant discovery before dismissing their complaint pursuant to Fed. R. Civ. P. 12(b)(6) violates their "right to petition for redress of grievances under the First and Fourteenth Amendments, and to Due Process of Law and Equal Protection of the laws under the Fifth Amendment to the United States Constitution." Castellano's Br. at 8-9. This claim, unsupported by authority, must be rejected as frivolous. *See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699-700 (2d Cir. 1994) (district courts consider only allegations in complaint in deciding 12(b)(6) motions); *M.B. #11072-054 v. Reish*, 119 F.3d 230, 232 (2d Cir. 1997) (district court's discovery rulings "reversed only upon a clear showing of an abuse of discretion.") (internal quotation marks omitted).

VII. *State Law Claims*

The Castellano, Graboski, and Adornetti appellants advance various New York state law claims in addition to their federal claims. These include asserted violations of several provisions of the New York Constitution, breach of the duty of fair representation under New York Civil Service Law § 2200 *et seq.*, unjust enrichment, quantum meruit, and violation of New York public policy against forfeiture of earned wages. In light of the district courts' proper dismissals of the federal claims of all of these appellants, save Velardi, those courts did not abuse their discretion in declining to exercise supplemental jurisdiction over the state claims. *See* 28 U.S.C. § 1367(c)(3); *see also Castellano v. Board*, 937 F.2d at 758-59 (affirming district court's dismissal of pendent state constitutional claims in light of dismissal of all federal constitutional claims).

We have carefully considered all of the appellants' remaining arguments and find them to be without merit. In addition, various appellees have raised a number of defenses including statutes of limitations, lack of personal involvement, Eleventh Amendment immunity, legislative immunity, immunity under 42 U.S.C. § 1983, the New York Constitution, and other state common law and statutory grounds. No appellee has raised any such defense in the Velardi case. In light of our disposition of these appeals, we need not consider these defenses.

Conclusion

The judgment dismissing the claim of *Velardi v. New York City Pension Fund* (No. 96-9237) is vacated and remanded for further proceedings and the parties shall pay their own costs for this appeal. All of the other judgments on appeal are affirmed. (Nos. 96-7920, 96-9257, 96-9289, 96-9601, 96-9004).

§ B19-40.00 of Chapter 877 of the Laws of 1970:

5. "Pension fund beneficiary". Any person who (a) receives a retirement allowance by reason of having retired from service as a member of pension fund one or pension fund one-B and as a fireman or as a wiper (uniformed), or (b) receives a benefit by reason of election of an option by such a retired fireman or such a retired wiper (uniformed).

§ B19-40.00 of Chapter 1011 and 1012 of the Laws of 1972:

5. "Pension fund beneficiary". Any person who (a) receives a retirement allowance by reason of having retired for service as a member of pension-fund one or pension fund one-B and as a fireman or as a wiper (uniformed), or (b) receives a benefit by reason of election of an option by such a retired fireman or such a retired wiper (uniformed).

§ 13-382 of Chapter 583 of the Laws of 1989:

5. "Pension fund beneficiary". Any person who receives a retirement allowance by reason of having retired, on or after October first, nineteen hundred sixty-eight, for service (with credit for twenty or more years of service creditable toward the minimum period) as a member of pension fund subchapter one or subchapter two and as a firefighter.

§ 13-385 of Chapter 690 of the Laws of 1990:

5. "Pension fund beneficiary". [Any] *Except as provided in subdivision e of section 13-385 of this subchapter, any* person who receives a retirement allowance by reason of having retired, on or after October first, nineteen hundred sixty-eight, for service (with credit for twenty or more years of service creditable toward the minimum period) as a member of pension fund subchapter one or subchapter two and as a firefighter.

§ 3. Section 13-385 of the administrative code of the city of New York is amended by adding a new subdivision e to read as follows:

e. Notwithstanding any inconsistent provision of this subchapter or any benefit plan or payment resolution that was in effect prior to July first, nineteen hundred eighty-eight, any original plan discontinued member (as defined in subdivision sixteen of section 13-313 of this chapter) or improved benefits plan discontinued member (as defined in subdivision sixteen-d of such section) who discontinued service as a firefighter on or after July first, nineteen hundred sixty-nine, but prior to July nineteenth, nineteen hundred eighty-nine shall be deemed to be a pension fund beneficiary for purposes of eligibility to receive supplemental benefits under this section for any period of time for which such discontinued member receives payments of a deferred retirement allowance pursuant to section 13-360 or 13-361 of this chapter, and the date of retirement of such discontinued member, for purposes of plying the requirements of this section which determine the eligibility of a pension fund beneficiary to receive supplemental benefits under this section, shall be deemed to be the first day of the period for which such discontinued member first began receiving payments of deferred retirement allowance pursuant to section 13-360 or 13-361 of this chapter.

U.S. Const., Art. 1, § 10, cl. 1

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .

N.Y. Const., Article V, § 7

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

N.Y. State Retirement and Social Security Law § 113

§ 113 Creation or modification of local retirement systems prohibited

a. No municipality, after April twelfth, nineteen hundred twenty-two, shall create any retirement system for its officers or employees.

N.Y. State Retirement and Social Security Law § 171

§ 171 Restriction on use of retirement or pension funds

No moneys belonging to any publicly administered and operated retirement or pension system or plan shall be appropriated or used for any purpose, or for any payment, authorized or required by this article.

N.Y. State Retirement and Social Security Law § 470

§ 470 Temporary suspension of retirement negotiations

Until July first, nineteen hundred ninety-nine, changes negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries, shall be prohibited.

Plaintiff and Comparison Sub-Classes Argued to the Second Circuit

Plaintiff Sub-Class #1(a)	Plaintiff Sub-Class #1(b)	Comparison Class #1
"Disability Retirees"	"Disability" Retirees	"Vested" Retirees
disabled	disabled	not disabled
Less than 15 years	15 – 20 years	15 – 20 years
NO VSF	NO VSF	VSF (Grandfathered)
	Plaintiff Sub-Class Ignored by Second Circuit	**Comparison Class Ignored By Second Circuit**

Plaintiff Sub-Class #2	Comparison Class #2
"Disability" Retirees * elected pre-1972	"Service" Retirees
disabled	not disabled
20 years	20 years
NO VSF	VSF
	Comparison Class Ignored By Second Circuit

Plaintiff Sub-Class #3	Comparison Class #2
"Disability" Retirees * elected pre-1972	"Service" Retirees
disabled	not disabled
20 years	20 years
NO VSF	VSF